Sarawak Shell Bhd v The Owners or other persons interested in The Ship or Vessel The 'Red Gold' and another action

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO D2–27–28 OF 2005 AND ADMIRALTY IN PERSONAM NO D2–27–24 OF 2005
NALLINI PATHMANATHAN J
26 AUGUST 2010

Shipping and Navigation — Merchant shipping — Collision — Limitation of liability — Collision between ship and offshore oil platform — Claim for damages against shipowners — Whether liability of shipowners limited under Merchant Shipping Ordinance 1952 — Whether collision caused by actual fault or privity of shipowners

Shipping and Navigation — Action in personam — Charter party — Payment of hire — Collision between ship and charterer's offshore oil platform — Claim for damages by charterer — Whether charterer could withhold payment of hire pending payment of damages by shipowner

Tort — Inducement of breach of contract — Interference with contractual relations — Unlawful interference — Spot-charter contract between Shell and Petrokapal — Charter contract between Petrokapal and shipowners — Collision between ship and Shell's offshore oil platform — Claim for damages by Shell — Shell withholding payment of hire to Petrokapal pending payment of damages by shipowner — Whether amounted to interference with charter contract between Petrokapal and shipowners

Tort — Negligence — Collision at sea — Collision between ship and offshore oil platform — Whether negligence and breach of duty of shipowners established — Plea of inevitable accident by shipowners — Whether onus on shipowners to rebut negligence and breach of duty — Failure of shipowners to provide reasonable explanation for collision — Whether accident would have occurred even without shipowner's negligence — Whether defence of inevitable accident failed — Whether damages proven

Tort — Negligence — Contributory negligence — Collision between ship and offshore oil platform — No mooring ropes at platform — Whether act of contributory negligence on part of platform owner — Lack of mooring ropes known

to shipowners earlier and no complaint raised by shipowners — Whether contributory negligence established

Tort — Negligence — Defence of inevitable accident — Whether onus on defendant to prove inevitable accident

Tort — Negligence — Res ipsa loquitur — Collision between ship and offshore oil platform — Whether principle of res ipsa loquitur relevant and applicable

On 4 February 2002 a vessel known as 'Red Gold' was involved in a collision with an offshore oil platform (D-35 Platform) owned by Sarawak Shell Bhd ('Sarawak Shell'). Sarawak Shell carried out offshore exploration and production activities using wooden platforms. The Red Gold had been chartered by Sarawak Shell to deliver supplies to its offshore platforms. Red Gold was owned by South Sumatra Richfield Marine Pte Ltd ('the owners') and was managed and operated by Pacific Richfield Marine (S) Pte Ltd ('PRM'). For the period in question it was on charter to Petrokapal Sdn Bhd who had entered into a spot charter with Sarawak Shell. On 17 January 2002 Red Gold was sent off hire for repairs and its bow thruster unit was overhauled and repaired by specialists. The repairs to the vessel were completed on 2 February 2002 and the vessel then resumed the charter on the same day. On 4 February 2002, while discharging supplies at Platform D-35, the vessel began drifting and the master attempted to correct the drift by use of the main engines and thruster so as to manoeuvre the vessel away. However, the pitching control of the bow thruster that was stuck at 30 degrees to the starboard and the vessel's wheelhouse collided with the platform at 4.30pm. The master managed to steer the vessel away by about 4.40pm. The chief engineer ('DW3') at about 5pm found that the power card in respect of the pitching of the bow thruster in the power card box was out of its slot. After he re-inserted the card back into its slot, the bow thruster pitching problem ceased instantaneously and functioned normally. Sarawak Shell commenced an action seeking compensation for the damage to the platform. On the other hand, the owners, PRM and Petrokapal commenced an action ('the hire action') against Sarawak Shell for the withholding of charter-hire due to them. Both suits were heard together. In the hire action the owners, PRM and Petrokapal claimed that outstanding hire had been wrongfully detained by Sarawak Shell. The owners and PRM also claimed in tort against Shell for inducing a breach of Petrokapal's contract with the former, or for wrongful interference with such contract. The issues that arose for consideration were: (i) Was the collision caused by the negligence of the owners? Sarawak Shell pleaded the doctrine of res ipsa loquitur; (ii) Was the collision an inevitable accident? (iii) Was there contributory negligence on the part of Sarawak Shell in respect of the collision? (iv) Were the owners entitled to limit liability under the Merchant Shipping Ordinance due to the absence of fault on their part? (v) Had Sarawak Shell established the loss and damage

suffered? The owners contended that Sarawak Shell had carried out maintenance works in addition to the repair works; (vi) Was Sarawak Shell entitled to withhold charter-hire under the charter party agreement on the basis of a set off of its claim for damages against the owners; and (vii) Were the owners entitled to damages for wrongful interference of the performance of the charter party agreement?

Held, allowing the plaintiff's claims with costs in Admiralty in Rem No D2–27–28 of 2005 and allowing the third plaintiff's claims with costs in Admiralty in Personam No D2–27–24 of 2005:

(1) The principle of res ipsa loquitur was relevant and applicable on the facts of the instant case, given that the collision was occasioned in broad daylight between the Red Gold and a stationary object. Even if res ipsa loquitur did not apply on the facts of this case, Sarawak Shell had established negligence and/or breach of duty on the part of the owners in relation to the collision. The onus therefore shifted to the owners to rebut the charge of negligence and breach of duty by showing that the cause of the collision was a cause not produced by them but one the result of which they could not avoid. Therefore whether by application of the presumption of res ipsa loquitur or applying the standard test for establishing negligence, the onus shifted to the owners to establish, as they had pleaded, inevitable accident (see paras 27–30).

(2) The owners had not established that the accident would have occurred even without their negligence. The power card was not securely placed or fastened so as to be immune to vibration. There was moreover no system of visual check in place to preclude such an occurrence. The collision was caused by a defect in the electrical box of the bow thruster unit, even if momentarily, when the power was cut off. The defect could have been rectified or avoided by a proper securing of the said power card and a system of routine visual checking. Thus, the defence of inevitable accident failed in that the owners failed to discharge the onus on them to provide a reasonable explanation for the collision and that it would have, in any event, occurred without their negligence (see para 75).

(3) There was no contributory negligence on the part of Shell in not providing mooring ropes at the point of discharge at the platform. The lack of such facilities was known to the owners at the outset of the charter party agreement and there was at no time any complaint or request for the same (see para 77).

(4) The Merchant Shipping Ordinance 1952 makes provision for the owners to limit their liability if the collision is not caused by their actual fault or privity. The burden lies on the owners to establish the absence of actual fault or privity. On the present facts, the owners had not discharged the burden of showing that they did all they reasonably could to put in place

a system of maintenance for the regular inspection of the power cards in the bow thruster unit. Therefore, there was no basis to limit liability (see paras 78, 90 & 105).

(5) There was no evidence to show that maintenance works were carried out in addition to the repair works. The owners also produced no independent evidence to support their contention that the cost of the repair work was excessive save for a bare averment (see para 115(c) & (e)).

(6) There was no provision in the charter party agreement allowing for the withholding of hire pending the payment of repair costs. Accordingly, Petrokapal was entitled to the outstanding hire sum of USD186,990.26 (see para 138).

(7) There were two separate and distinct contracts between Shell and Petrokapal and Petrokapal and the owners. It did not follow that simply because Shell withheld the hire that Petrokapal was justified in also withholding or refusing to pay its contractual dues under its contract with the owners. It was open at all times to Petrokapal to fulfil its contractual obligations to the owners and seek compensation from Shell for its wrongful detention of the outstanding hire. Further there was no deliberate or overt act to show that Shell deliberately sought to cause detriment to the owners. There was also no evidence that Shell utilised unlawful means albeit directly or indirectly to procure an interference with Petrokapal's contract with the owners (see paras 143–144).

[Bahasa Malaysia summary

Pada 4 Februari 2002, sebuah kapal dikenali sebagai 'Red Gold' terlibat dalam perlanggaran dengan pelantar minyak luar pesisir (Pelantar D-35) dimiliki oleh Sarawak Shell Bhd ('Sarawak Shell'). Sarawak Shell menjalankan cari gali luar pesisir dan aktiviti-aktiviti pengeluaran menggunakan pelantar kayu. Red Gold telah dicarter oleh Sarawak Shell untuk menghantar bekalan ke pelantar luar pesisirnya. Red Gold dimiliki oleh South Sumatra Richfield Marine Pte Ltd ('pemilik') dan diurus dan diusahakan oleh Pacific Richfield Marine (S) Pte Ltd ('PRM'). Bagi tempoh masa yang dipersoalkan, Red Gold dicarter oleh Petrokapal Sdn Bhd yang memasuki carter spot dengan Sarawak Shell. Pada 17 Januari 2002, Red Gold dihantar untuk dibaiki dan unit penujah haluannya dibaik pulih dan diperbaiki oleh pakar. Kerja-kerja pembaikan kapal tersebut selesai pada 2 Februari 2002 dan kapal tersebut menyambung carternya pada hari yang sama. Pada 4 Februari 2002, sementara melabuhkan bekalan di Pelantar D-35, kapal tersebut hanyut dan nakhoda kapal cuba membetulkan kedudukan kapal dengan menggunakan enjin-enjin utama dan penujah untuk mengemudi kapal itu. Walau bagaimanapun, kawalan anggulan penujah haluan yang tersangkut pada 30 darjah ke kanan dan rumah roda kapal berlanggar dengan pelantar tersebut pada 4.30 petang. Nakhoda berjaya mengemudi kapal kira-kira jam 4.40 petang. Ketua jurutera ('DW3') pada

kira-kira jam 5 petang mendapati bahawa kad kuasa kawalan anggulan penujah haluan dalam kotak kad kuasa terkeluar dari slotnya. Selepas dia memasukkan semula kad tersebut dalam slotnya, masalah anggulan penujah haluan sudah tidak ada lagi dan berfungsi seperti biasa. Sarawak Shell memulakan tindakan memohon pampasan bagi kerosakan pelantar tersebut. Manakala pemiliknya, PRM dan Petrokapal memulakan tindakan ('tindakan sewaan') terhadap Sarawak Shell kerana tidak mahu memberikan sewaan carter yang tertunggak kepada mereka. Kedua-dua guaman didengar bersama. Dalam tindakan sewaan, pemilik-pemilik, PRM dan Petrokapal mendakwa bahawa sewaan tertunggak yang telah ditahan secara salah oleh Sarawak Shell. Pemilik-pemilik dan PRM juga mendakwa dalam tort terhadap Shell kerana menyebabkan kemungkiran kontrak Petrokapal dengan Shell, atau mencampuri urusan kontrak tersebut secara salah. Isu-isu yang berbangkit untuk dipertimbangkan ialah: (i) Adakah perlanggaran tersebut berlaku kerana kecuaian pemilik-pemilik? Sarawak Shell memplid doktrin res ipsa loquitur; (ii) Adakah perlanggaran itu suatu kemalangan yang tidak dapat dielakkan? (iii) Adakah terdapat kecuaian sertaan di pihak Sarawak Shell berkaitan perlanggaran tersebut? (iv) Adakah pemilik-pemilik berhak menghadkan liabiliti di bawah Ordinan Perkapalan Saudagar 1952 kerana tiada kesilapan di pihak mereka? (v) Adakah Sarawak Shell telah membuktikan kerugian dan kerosakan yang dialami? Pemilik-pemilik berhujah bahawa Sarawak Shell telah melakukan kerja-kerja penyelenggaraan sebagai tambahan kepada kerja-kerja pembaikan; (vi) Adakah Sarawak Shell berhak untuk menahan sewa carter di bawah perjanjian carter parti atas dasar penolakan tuntutannya untuk ganti rugi terhadap pemilik-pemilik; dan (vii) Adakah pemilik berhak ke atas ganti rugi terhadap campur tangan secara salah pelaksanaan perjanjian carter parti tersebut?

Diputuskan, membenarkan tuntutan plaintif dengan kos dalam Admiralti in Rem No D2–27–28 Tahun 2005 dan membenarkan tuntutan plaintif ketiga dengan kos dalam Admiralti in Personam No D2–27–24 Tahun 2005:

(1) Prinsip res ipsa loquitor adalah relevan dan terpakai atas fakta-fakta kes ini, memandangkan perlanggaran tersebut berlaku pada siang hari antara kapal Red Gold dan objek yang tidak bergerak. Walaupun jika res ipsa loquitur tidak terpakai atas fakta-fakta kes ini, Sarawak Shell telah membuktikan kecuaian dan/atau kemungkiran kewajipan di pihak pemilik-pemilik berikutan perlanggaran tersebut. Beban oleh itu beralih kepada pemilik-pemilik untuk mematahkan tuduhan kecuaian dan kemungkiran kewajipan dengan menunjukkan bahawa sebab perlanggaran tersebut tidak diakibatkan oleh mereka tetapi akibat daripada sesuatu yang tidak dapat dielakkan. Oleh itu, sama ada dengan pemakaian anggapan res ipsa loquitur atau mengguna pakai ujian standard untuk membuktikan kecuaian, beban beralih kepada

pemilik-pemilik untuk membuktikan, seperti yang mereka plidkan, kemalangan yang tidak dapat dielakkan (lihat perenggan 27–30).

(2) Pemilik-pemilik tidak dapat membuktikan bahawa kemalangan tersebut akan berlaku juga walau tanpa kecuaian mereka. Kad kuasa tidak diletakkan betul-betul agar tidak terjejas dengan getaran. Lagi pula, tiada sistem pemeriksaan visual untuk mengelakkan perkara tersebut berlaku. Perlanggaran tersebut disebabkan oleh kecacatan dalam kotak elektrik unit penujah haluan, walaupun jika hanya sekejap, apabila kuasa elektrik terpotong. Kecacatan tersebut boleh diperbetulkan atau dielakkan dengan meletakkan kad kuasa tersebut dengan betul dan adanya sistem pemeriksaan visual rutin. Maka, pembelaan kemalangan yang tidak dapat dielakkan gagal kerana pemilik-pemilik gagal melepaskan beban pembuktiannya untuk memberikan penjelasan yang munasabah bagi perlanggaran tersebut dan dalam apa jua keadaan, kemalangan tersebut akan berlaku tanpa kecuaian mereka (lihat perenggan 75).

(3) Tiada kecuaian sertaan di pihak Shell dengan tidak menyediakan tali-tali untuk berlabuh pada masa pemunggahan muatan di pelantar tersebut. Ketiadaan kemudahan tersebut diketahui oleh pemilik-pemilik pada permulaan perjanjian carter parti tersebut dan tiada aduan ataupun permintaan untuk kemudahan tersebut (lihat perenggan 77).

(4) Ordinan Perkapalan Saudagar 1952 memperuntukkan peruntukan bagi pemilik-pemilik untuk menghadkan liabiliti mereka jika perlanggaran tidak disebabkan oleh kesalahan mereka atau priviti. Beban terletak pada pemilik-pemilik untuk membuktikan ketiadaan kesalahan mereka atau priviti. Atas fakta-fakta kes ini, pemilik-pemilik tidak melepaskan beban untuk menunjukkan bahawa mereka telah melakukan segalanya yang munasabah untuk memastikan adanya sistem penyelenggaraan untuk pemeriksaan tetap kad-kad kuasa dalam unit penujah haluan. Oleh itu, tiada asas untuk menghadkan liabiliti (lihat perenggan 78, 90 & 105).

(5) Tiada keterangan bagi menunjukkan bahawa kerja-kerja penyelenggaraan dijalankan sebagai tambahan kepada kerja-kerja pembaikan. Pemilik-pemilik tidak mengemukakan keterangan bebas untuk menyokong hujahan mereka bahawa kos kerja pembaikan adalah berlebih-lebihan, malah, mereka hanya membuat penafian semata-mata (lihat perenggan 115(c) & (e)).

(6) Tiada peruntukan dalam perjanjian carter parti tersebut yang membenarkan sewaan ditahan sementara menunggu pembayaran kos-kos pembaikan. Maka, Petrokapal berhak ke atas sewaan tertunggak sebanyak USD186,990.26 (lihat perenggan 138).

(7) Terdapat dua kontrak yang berbeza yang berasingan antara Shell dan Petrokapal dan Petrokapal dan pemilik-pemilik. Hanya disebabkan Shell menahan sewaan maka tidak boleh dikatakan Petrokapal boleh menahan

atau tidak mahu membayar kewajipan kontraktualnya kepada pemilik-pemilik. Adalah terbuka kepada Petrokapal untuk memenuhi tanggungjawab kontraktualnya kepada pemilik-pemilik dan memohon pampasan daripada Shell kerana menahan sewaan yang terakru. Selanjutnya, tiada tindakan sengaja atau terang-terangan yang menunjukkan bahawa Shell dengan sengaja memohon untuk mengakibatkan pemilik-pemilik terjejas. Juga tiada keterangan bahawa Shell menggunakan cara tak sah sama ada secara langsung atau tidak, untuk mengakibatkan campur tangan dalam kontrak Petrokapal dan pemilik-pemilik (lihat perenggan 143–144).]

Notes

For a case on collision at sea, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 873.

For cases on action in personam generally, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 956–960.

For cases on collision, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1478–1507.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 880–931.

For cases on interference with contractual relations, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 668–671.

For cases on negligence generally, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 712–1542.

For cases on res ipsa loquitur, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1224–1257.

Cases referred to

Aralia, The (1949) 82 Ll L Rep 884 (refd)

Austasia Line Ltd v Singapore Pilot Association (Suit No 1542 of 1957, unreported) (folld)

Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The 'Eurysthenes') [1976] 2 Lloyd's Rep 171, CA (refd)

Grand Champion Tankers Ltd v Norpipe A/S and others (on appeal from The Marion) [1984] AC 563, HL (refd)

Humorist, The (1946) 79 Lloyd's Law Report 549 (refd)

Kite, The [1933] P 154 (refd)

Liong Ung Kwong v Kee Hin (M) Sdn Bhd & Anor [1997] MLJU 260 ; [1997] 1 LNS 300, HC (distd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, FC (refd)

Merchant Prince, The [1892] P 179 (folld)

Moore v R Fox and Sons [1956] 1 QBD 596, CA (folld)

Northern Fishing Company (Hull) Ltd v Eddom and others (The 'Norman') [1960] 1 Lloyd's Rep 1, HL (refd)
OBG Ltd and another v Allan and others [2005] 2 WLR 1174, HL (refd)
Rederij Erven H Groen and Groen v The 'England' (Owners) and others [1973] 1 Lloyd's Rep 373, CA (refd)
Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and others [2002] 2 Lloyd's Rep 436, CA (refd)
Spider, The (1932) 43 Ll L Rep 217 (refd)
'Sunrise Crane' [2004] SGCA 42, The [2004] 4 SLR 715, CA (folld)

Legislation referred to

Merchant Shipping Act 1894 [UK] s 503
Merchant Shipping Act (Cap 179) [SG]
Merchant Shipping Ordinance 1952

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Nallini Pathmanathan J:

[1] On 4 February 2002 at about 4.15pm a vessel known as 'Red Gold' was involved in a collision with an offshore oil platform owned by Sarawak Shell Bhd ('Sarawak Shell'). Sarawak Shell carries out offshore exploration and production activities using wooden platforms with pipelines extending to a considerable distance into the sea bed. These pipelines are used to convey the oil or gas which has been produced offshore. Such oil or gas is then stored in shore tanks which are in turn connected by pipelines to pump the oil directly into vessels.

[2] Once Sarawak Shell has identified an offshore oil well, several platforms, namely a drilling platform, a production platform and a living quarter platform for the crew's accommodation are built. These platforms are all linked by bridges. It is this entire set of platforms which comprise an exploration and production platform complex. In the instant case, the platform complex in question is known as the D35 Offshore Complex. It comprises four platforms which are located at 47 metres water depth and arranged in an 'L' shaped complex. The only platform in this complex involved in the collision with the Red Gold is Platform D-35 PG-A, which is located at the mid length of the north-south or vertical line of the 'L' shape. The other platforms, namely the

A riser platform at the northern end of the 'L' shape, the drilling platform at the southern tip of the 'L' shape and the accommodation platform at the eastern tip or right side of the 'L' shape were not involved. The platforms are spaced approximately 200 feet apart and are interconnected with bridges.

B **[3]** To facilitate its exploration and production function, Sarawak Shell required supplies to be delivered to the platforms. Such supplies included the provision of fuel, provision for workers, spare parts, equipment etc. It received such supplies from vessels which would proceed to the platforms and unload the supplies there. Sarawak Shell chartered vessels to provide these supplies. C One of the vessels so chartered, after a stringent tender exercise, was the vessel 'Red Gold' ('Red Gold') which was chartered for a term of seven and a half months from 15 July 2001. This is called a spot charter or a short term charter as compared to long term contracts which can last from three to ten years.

D **[4]** Red Gold is a supply vessel used to load and carry supplies to various locations. For the purposes of Shell's operations, Red Gold was required to transport supplies to the exploration and production platform complex. It is owned by South Sumatra Richfield Marine Pte Ltd ('the owners') as evidenced E from the extract from the certificate of registry. It is managed and operated by Pacific Richfield Marine (S) Pte Ltd ('PRM'). For the period in question it was on charter to Petrokapal Sdn Bhd who had entered into the aforesaid sport charter with Sarawak Shell.

F **[5]** Red Gold was under charter to Shell under three consecutive charterparties beginning on 13 November 2000 vide contracts entered into between Shell and Petrokapal. The third and latest charter party was for a period of seven and a half months, commencing from 15 July 2001 to February 2002. Petrokapal had, in turn, back to back charterparties for the hire of the G vessel from the owners through Pacific Richfield Marine (S) Pte Ltd ('PRM') as Managers of the Red Gold.

[6] On 17 January 2002 Red Gold was sent off hire for repairs to the main engine shaft and bow thruster unit which was to be undertaken at Sabah H Shipyard in Labuan. The bow thruster unit was overhauled and repaired by specialists in this field, namely Rolls-Royce.The repairs to the vessel were completed on 2 February 2002 and the vessel then resumed the charter at 11am on the same day. It carried out a supply run to a number of offshore installations and a number of other locations. Red Gold then attended at the I West Pelaut Platform and departed from there bound for the D-35 Platform Complex at 9.10am on the morning of 4 February 2002. It arrived on location at D-35 at 3pm. It then commenced discharging cargo on the southern side of the platform located on the right most tip of the 'L' shape, ie Platform D-35 PG-A. The mode of discharge was by the snatch lift method. A snatch lift

means that the cargo was picked up from the deck without the use of any sling or rope to fasten the cargo. There are no mooring facilities on the D-35 Platform. This therefore means that the vessel has to be positioned correctly near the platform in order to facilitate this function.

[7] After transferring five lifts, the vessel was instructed to proceed to D-35 PG-A, the subject platform to discharge the remainder of the cargo in the same manner. The distance between the vessel and the D-35-QA Platform was approximately one to one and a half times the length of the Red Gold. At about 4.20pm discharge of cargo by snatching commenced at the D-35-QA Platform.

[8] At 4.25pm eye witnesses including one Yohan Pada, DW2 described how the vessel appeared to be drifting in a southerly direction. The starboard was closing in on the platform. The master of the vessel, Captain Jantje Turangan ('the master') who was controlling the wheel was immediately alerted.

[9] The master however had already observed that the vessel was drifting towards the south and he attempted to correct this drift by use of the main engines and thruster so as to manoeuvre the vessel away. He advised DW2 that there was a problem with the pitching control of the bow thruster that was stuck at 30 degrees to the starboard. Attempts were then made, according to DW2 to push the bow thruster emergency cut-off button to turn off the bow thruster engine but this was not successful. The ship's general alarm was activated to warn of imminent contact between the vessel and the platform. In the interim, the master remained at the controls endeavouring to steer the vessel away from the platform. Notwithstanding these efforts the vessel's wheelhouse collided with the north-west corner of the platform at 4.30pm. The master continued to use the two main engines and rudders to manoeuvre the vessel clear of the platform. He managed to steer the vessel away by about 4.40pm.

[10] The master then alerted the chief engineer, Suyarman, DW3 ('DW3') about the pitching problem with the vessel's bow thruster. DW3 testified that he went to the bow thruster engine room and checked for mechanical or hydraulic issues that could have given rise to the problem. He could not, however, detect anything wrong. He next went up to the bridge to ascertain whether the failure was caused by an electronic failure. DW3 proceeded to inspect the power card box located underneath the forward console manoeuvring on the bridge of the vessel. He opened the sealed box containing the power cards and their slots. He testified that he discovered that the power card in respect of the pitching of the bow thruster was out of its slot. He made this discovery at 5pm on the same day, the accident having occurred at 4.30pm.

[11] DW3 further testified that he called for the master and showed him that the bow thruster power card had been dislodged from its slot. After that he re-inserted the card back into its slot after which the bow thruster pitching problem ceased instantaneously and functioned normally.

[12] A vehicle incident report prepared by the master of the Red Gold summarises the description of the incident, inter alia, thus: '... The lost control of Bow Thruster due to faulty electrical system, ...' It also cites the 'Initial Finding' as follows: '... 17.00 Hrs. Chief Engineer founded Bow Thruster Power Card to control pitch propeller was lost power.'

[13] The vessel departed from the area at 7.30pm and arrived at Labuan at 7pm the following day, ie 5 February. It was off-hired by 9.30pm on 5 February and proceeded to Sabah Shipyard for repairs on 6 February.

[14] Sarawak Shell was alerted about the collision immediately after it occurred. It made arrangements for an inspection of the vessel and an investigation to be conducted primarily with a view to preventing recurrence. The investigative team comprised representatives from PRM and the owners. It commenced at 9.30am on 6 February.

[15] After an inspection of the damage to the vessel sustained from the collision, the team was briefed by Suyarman about the problem with the bow thruster card. The damage to the platform was also inspected and noted. From the investigation a number of recommendations were made including, inter alia, the issuance of a safety alert to all chartered vessels, the need for a retaining mechanism to hold the bow thruster power card in place at all times, a review of the shipboard emergency response procedure, a check of the power cards in the wheelhouse and engine room prior to entering the 500 metres zone of platform and to reinstate the provision of stern moorings at platforms.

[16] The foregoing comprises the salient facts relating to the collision. However, apart from the in rem action (D2–27–28 of 2005) ('the collision action'), the facts of which are set out above, the trial also encompassed an in personam action (D3(D2)–27–24 of 2005)('the hire action') taken by the owners, PRM and Petrokapal against Sarawak Shell Bhd and Sabah Shell Petroleum Co Ltd for the withholding of charter-hire due to them. The two suits were ordered to be heard together as they arise from the same subject matter factually.

[17] In the hire action the owners, PRM and Petrokapal as the plaintiffs maintain that outstanding hire has been wrongfully detained by Shell and accordingly the sum of USD186,990.26 together with interest is due to them. Further the owners and PRM claim in tort against Shell for inducing a breach

of Petrokapal's contract with the former, or for wrongful interference with such contract, causing loss.

THE ISSUES

[18] The issues that arise for consideration in these two suits which were heard together may be summarised thus:

(a) Was the collision caused by the negligence and/or breach of contract on the part of the owners its servants or agents in the navigation or management of the Red Gold?

(b) Was the collision an inevitable accident that occurred without any negligence on the part of the owners or its servants such that no liability rests with the owners?

(c) If there was negligence on the part of the owners, their servants or agents, was there contributory negligence on the part of Sarawak Shell in respect of the collision action?

(d) Are the owners entitled to limit liability under the Merchant Shipping Ordinance due to the absence of actual fault or privity on the part of the owners? If so, what is the quantum of that limitation amount?

(e) If liability is made out against the owners in the collision action has Sarawak Shell established or proved the loss and damage suffered?

(f) In the hire action, was Sarawak Shell entitled to withhold charter-hire under the charter party agreement on the basis of a set off of its claim for damages against the owners;

(g) Are the owners entitled to damages for wrongful interference of the performance of the charter party agreement?

Issues (i), (ii) and (iii)

(i) Was the collision caused by the negligence and/or breach of contract on the part of the owners its servants or agents in the navigation or management of the Red Gold?

(ii) Was the collision an inevitable accident that occurred without any negligence on the part of the owners or its servants such that no liability rests with the owners?

(iii) If there was negligence on the part of the owners, their servants or agents, was there contributory negligence on the part of Sarawak Shell in respect of the collision action?

[19] Issues (i), (ii) and (iii) can be considered in conjunction as they relate to the issue of liability for the collision. Prior to a consideration of the evidence relating to the collision however, it is necessary to consider the issue of the

A burden of proof and where it lays on the peculiar facts of the instant case.

THE BURDEN OF PROOF AND THE PLEADINGS

B **[20]** Sarawak Shell alleges that the damage it suffered by reason of the collision was due solely to the negligence on the part of the owners, their servants or agents either in the navigation or management of the vessel. Alternatively they maintain that there was a breach of duty on the part of the owners. Accordingly the cause of action is based on negligence. Sarawak Shell then particularised the negligence, citing nine instances of alleged negligence in C relation to both navigation as well as management of the vessel, more particularly the bow thruster. This is what they said in para 3 of the statement of claim: '... The collision was caused by the negligent navigation and/or management and/or breach of duty on the part of the owner or other persons interested in the ship or vessel 'RED GOLD'.

D

[21] It is evident from the foregoing that the allegation against the owners is of:

(a) negligent navigation arising from vicarious liability for the acts or E omissions of the master in the navigation of the vessel;

(b) negligent management of the vessel by the owners; and

(c) breach of duty on the part of the owners.

F **[22]** The statement of claim then particularises from (a)–(i) instances of negligent acts and omissions in relation to the categories above. Particulars (a)–(d), (h) and (i) comprise allegations of negligent navigation in relation to the conduct of the master in the steering and navigation of the vessel immediately prior to the collision. Particulars (e) and (f) relate specifically to G the bow thruster, while particular (g) relates to the maintenance of the vessel in general. It is therefore clear in this case that the allegations of negligence encompass the acts of the master for which the owners are vicariously responsible as well as the maintenance, supervision and care expended in the maintenance of the bow thruster unit. The plaintiff, Sarawak Shell is therefore H at liberty to found its case within the ambit of these pleaded features. As the cause of action is founded in negligence the legal burden throughout remains on Sarawak Shell, as the plaintiff. If the facts permit Sarawak Shell may utilise presumptions such as res ipsa loquitur, but at the end of the case the question to be posed will be whether the legal burden has been discharged by Sarawak I Shell. If it has done so, then it succeeds as the plaintiff. If Sarawak Shell fails to discharge that burden, the owners succeed. If the matter is left evenly in the balance then too Sarawak Shell fails. This then disposes of the issue of the burden of proof in relation to negligence which is the basis for the plaintiff's cause of action.

[23] However, Sarawak Shell has pleaded the rule of res ipsa loquitur in its claim. Accordingly, the next matter for consideration is whether the rule of res ipsa loquitur applies to the facts of the instant case, such that the onus of proof shifts to the owners. If so, it then falls upon the owners to rebut the presumption of fault upon them by adducing evidence to show that no amount of reasonable care and skill would have prevented the collision and that it was in fact, an inevitable accident, which therefore relieves the owners from liability. The test is that of a reasonable explanation.

[24] This principle was set out in *The Merchant Prince* [1892] P 179. In that case, the plaintiff's steamer was lying at anchor in the Mersey during daylight hours, when the Merchant Prince, belonging to the defendants, which was coming down the river, struck the plaintiff's steamer a heavy blow doing considerable damage to her. According to the defendants, the collision and damage were caused by a latent defect in the steering gear, leading to the jamming of the wheel such that the collision could not be avoided. Lord Esher then stated the rule, long laid down in the admiralty courts as follows:

> ... What is the position of things? She has run into a ship at anchor and she herself was under way. It is said that we are going to change the whole law by what I am about to say; but has it not been laid down by this court that where a ship is under way, and she runs into a ship at anchor, that is prima facie evidence of negligence on her part; that the ship at anchor has only to state the fact, and that it was daylight, or, if it was night, 'I had my light up.' That is all she has to say; and the mere fact of running into her is evidence of negligence on the other side. Why is that? Because after long experience the courts have come to this conclusion that as a matter of truth and fact the one ship ought to be under perfect command and therefore able to get out of the way of the other ship if she sees her, and other is a helpless thing which cannot do anything. The law is laid down from the palpable truth of the circumstances of such a case. The great object of the judges in admiralty cases has been to lay down a plain rule to govern the acts of sailors and not have niceties of argument about what they are to do; and the plain rule which they have laid down is this: Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. Then they have gone on with some variation of phraseology, but I am bound to say that if you look into all the cases with an agreement of fact, that the only way of a man to get rid of that which circumstances prove against him as negligence is to she that it occurred by an accident which was inevitable by him — that is an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by shewing inevitable accident, that is by shewing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him ...

[25] The facts relating to the fact of the collision are not in dispute here. In like manner in the instant case, the platform was a stationary object and the Red Gold was 'under way' in so far as she had been driven alongside the

platform to facilitate the discharge of cargo onto it. The pitch control of the bow thruster unit jammed, causing the pitch to be stuck at 30 degrees starboard thereby causing the vessel to move inexorably in the direction of the platform and eventually colliding with the same, notwithstanding measures taken to avoid contact. It is therefore clear that an application of the 'plain rule' in *The Merchant Prince* is directly relevant on the facts of this case and accordingly the rule or presumption of res ipsa loquitur applies, establishing prima facie negligence as against the owners. It then falls upon the owners to rebut the circumstances which prima facie establish negligence by showing that the collision or accident was caused by something that the owners could not by any act of theirs have avoided.

[26] In the case of *Moore v R Fox and Sons* [1956] 1 QBD 596 the doctrine of res ipsa loquitur was applied. A workman was killed by an explosion while operating a de-rusting tank. The explosion occurred underneath the tank filled with liquid chemicals and heated by gas and thermostatically controlled. The explosion was caused by the accumulation of unburned gas which exploded due to exposure to flames from burning jets which were part of the system. The reason why the gas accumulated was never determined. The High Court in the United Kingdom accepted the plaintiff's contention that the principle of res ipsa loquitur applied, in that the facts of the explosion spoke for itself and led to the conclusion of negligence on the defendant's part unless it could be otherwise explained. The onus therefore shifted to the defendants. This approach in relation to the application of the doctrine was not reversed by the Court of Appeal although they did reverse the finding of the High Court that the defendant in that case had successfully discharged the burden placed on them. And in the Singapore case of *Austasia Line Ltd v Singapore Pilot Association* (Suit No 1542 of 1957, unreported) the doctrine of res ipsa loquitur was again applied where the facts disclosed that the vessel while approaching a dock yard under the control of a licensed pilot collided with the wall of the entrance to the dock. The court there accepted that on the facts the doctrine applied because it was a collision by a vessel into the wall in broad daylight when the sea was calm, the visibility good and conditions for navigating were normal and the wall a stationery object that was incapable of getting in the way.

[27] On a perusal of these authorities I conclude that the principle of res ipsa loquitur is relevant and applicable on the facts of the instant case, given that the collision was occasioned in broad daylight between the Red Gold and a stationary object.

[28] Even if I am wrong in concluding that res ipsa loquitur applies on the facts of this case, and the burden rests on Sarawak Shell to establish negligence and/or breach of duty on the part of the owners in relation to the collision within the ambit of the statement of claim, it follows that prima facie such

negligence is established, to my mind, by the following facts:

(a) The first stage of the test to establish negligence is the existence of a duty of care. The owners of the vessel owe a duty of care to Sarawak Shell to ensure that the Red Gold was functioning regularly and safely at all material times during the tenure of the charter party agreement.

(b) On 4 February 2002, the electrical component of the bow thruster unit of the Red Gold was clearly not functioning conventionally when the pitch control became stuck at 30 degrees starboard.

(c) Prima facie, and in the absence of a reasonable explanation, the malfunctioning of the bow thruster unit amounted to a breach of the duty of care owed by the owners to Sarawak Shell. This therefore establishes the second stage of the test, namely that of a breach of the duty of care owed.

(d) As a consequence of the malfunctioning of the bow thruster unit, the vessel could not be controlled, resulting in the collision with the platform and thereby damage to Sarawak Shell. As such it follows that as a consequence of the breach of the duty of care owed by the owners to Sarawak Shell, damage was sustained, thereby completing the third stage of the test for negligence.

[29] Thus the elements sufficient to found a prima facie basis for negligence stands established by Sarawak Shell. The onus then shifts to the owners to rebut the charge of negligence and breach of duty by showing that the cause of the collision was a cause not produced by them but one the result of which he could not avoid.

[30] Therefore whether by application of the presumption of res ipsa loquitur or applying the standard test for establishing negligence, the facts of the instant case arrive at the same point or prima facie conclusion, namely that the onus shifts to the owners to establish, as they have comprehensively pleaded, inevitable accident.

IS THE DEFENCE OF 'INEVITABLE ACCIDENT' MADE OUT?

[31] In order to ascertain whether inevitable accident is applicable here, it is necessary to consider in greater detail the factual evidence in relation to, inter alia, the history and functioning of the bow thruster unit.

THE BOW THRUSTER UNIT

[32] DW4, the chief engineer, Suyarman ('the chief engineer') testified that he attended to and ensured the proper functioning of the mechanical,

hydraulic and electrical systems of the Red Gold. He further explained that the second and third engineers also check the engines and the bow thruster twice a day to ensure that there are no problems. Their findings are entered into an engine log which is maintained on a daily basis. The entry for the date of the incident, ie 4 February 2002, by DW3 reads as follows:

> ... 16.35 Vsl drifting to PD platform. The loss control of bow thruster due to faulty electrical system.
>
> 17.00 Found out the short cut of pitch no power (pitch control unit).

[33] Prior to this, the bow thruster unit had sustained some problems, albeit not with the electrical component. On 29 November 2003, slightly over two months prior to the collision, DW3 discovered that there was a mechanical problem with the bow thruster and made a report with a view to having it repaired when it dry-docked. According to DW3 the mechanical problem arose as a consequence of ropes getting caught in the bow thruster, as a result of which there were engine oil leaks causing in turn the oil indicators to malfunction. The Red Gold was then dry docked from 21 January to 1 February 2002, ie until three days prior to the incident, so as to rectify these problems.

[34] The evidence of DW1, Poh Swan Gee, the specialist engineer from Rolls-Royce who dealt with the bow thruster unit during this period of dry docking, is that he was engaged by the owners of the Red Gold to conduct tests on and overhaul the bow thruster and the norgear components of the bow thruster unit of the Red Gold. This makes reference to the hydraulic and mechanical components of the bow thruster unit. In other words, the scope of his work undertaken in January 2002 was primarily the overhaul of the hydraulic and mechanical components of the bow thruster unit. DW1 confirmed in cross-examination that he was not engaged to check on the electrical system. He stated that as there was no mention of any possible defect in the electrical system, he restricted his work to the scope assigned to him.

[35] He explained that the function of the bow thruster is solely for purposes of maneuverability so as to facilitate the positioning of the vessel. DW1 went on to explain that the connection between the bow thruster unit and its control is via an electrical system called the feedback unit. The electrical system comprises a series of cards in an electric box which supplies voltage. There is also a card which controls the pitch of the thruster blade's angle. He explained that the card which supplies voltage to the system is called the 'MUP 21' card. In all there are three cards in the electric box and there is also a series of knobs. Collectively the cards and knobs control the function of the bow thruster unit. If any one of these cards is displaced or non-functioning, the unit's function will similarly be impaired. DW1 confirmed that the electrical control system

therefore comprised an integral part of the entire bow thruster system for the vessel. However DW1 maintained that notwithstanding this, the electric box was not supposed to be subject to regular maintenance by the crew. He went on to state initially that there was no access to the electric box to allow for such checks. However when it was pointed out to him that in the instant case, the chief engineer was able, fairly quickly, to gain access to the system and even identify the specific nature of the problem with the card immediately after the incident on 4 February, DW1 responded that the crew could open the electric box and visually look at it. He went on to explain that with the use of a screwdriver the screw securing the box could be opened, thereby granting access to the subject cards.

[36] As far as his repair tasks for the unit were concerned in January 2002, DW1 stated that having completed his assigned tasks, he tested the unit and found that there was a problem with the electrical component of the system. Specifically he found that the MUP 21 card was defective. That is the same card that was dislodged or displaced during the incident on 4 February. What DW1 found was that there was no voltage supply to the remote control system. As he did not possess the expertise to ascertain the reason for this defect, he followed prescribed procedure and simply replaced the defective MUP 21 card with a spare card that was present on board the vessel. The bow thruster unit functioned well after that, according to DW1. The defective card was returned to the owners. DW1 confirmed that while it was unusual for a power card to be defective in this manner, he suggested that it could be due to aging. He categorized the failure as not being common but one that was known to happen. Additionally DW1 also testified that he found that an integral wire located in another part of the bow thruster unit had been deliberately dismantled. He rectified this defect by reconnecting the wire.

[37] Subsequently in the course of the chief engineer, DW3's evidence, it transpired that he had deliberately removed the wire in order to facilitate or optimise the functioning of the bow thruster unit which had been experiencing problems in November 2001. It is evident from the foregoing that there had been problems with the bow thruster unit prior to the incident on 4 February 2002. The problem in November 2001 related to a different part of the bow thruster and appears to be distinct from the problems with the electrical component of the unit, which arose in early February 2002.

[38] The evidence of DW1 discloses that there was a problem with the power card or MUP 21 card when the vessel and the bow thruster unit was tested by way of a trial run on 1 February 2002. Then three days later problems emanated with the dislodgement of the same power card or MUP 21 card resulting in the malfunctioning of the bow thruster unit. Both the later incidents or problems appear to have emanated from the electrical component

of the bow thruster unit in that they both related to the same power card. A perusal of the contemporaneous report made by the chief engineer in the engine/deck log and the incident report both stipulate that power to the card was 'cut off'. The oral evidence of the chief engineer is that the card was dislodged. In both cases the problem related to the same card and the same component of the bow thruster.

[39] In summary DW1 testified that:

(a) the dislodgement of the MUP 21 power card in the electrical box of the bow thruster unit had not been known to occur previously;

(b) it was not a design fault that caused the dislodgement but most probably the vibration of the vessel;

(c) it was not feasible for the crew to conduct regular checks on the electrical component of the bow thruster unit;

(d) he had discovered a problem with the previous MUP21 card while testing the unit after repairs and had replaced the 'defective' card with the card that was dislodged on 4 February;

(e) he had discovered that an electrical wire in another part of the bow thruster unit had been deliberately removed by the chief engineer in an attempt to improve the bow thruster's performance. He re-inserted the same.

[40] In essence DW1 was unable to explain the reason for the dislodgement of the power card save that it could be vibration. He testified that the incident was unforeseeable and that nothing could be done to preclude its recurrence, save to refer the problem to Rolls-Royce, as specialist engineers.

[41] The chief engineer, DW4 testified that there were problems with the bow thruster unit sometime in October or November 2001, prior to the vessel being sent for repairs. He described the problem as not being unduly serious as the bow thruster could still be used. He identified the problem as arising from a leakage of hydraulic oil in the expansion tank as a consequence of the unit hitting mooring ropes. He made this assumption about the cause of the problem from the symptoms of overheating and excessive vibration that he encountered subsequently. Apart from this problem there was also a problem with the readings or monitoring on the control of the bow thruster panel.

[42] The chief engineer also confirmed that on 16 January 2002 he had identified a problem with the bow thruster, resulting in cargo operations being ceased. He found that the pitch propeller of the bow thruster unit had problems. Accordingly he removed one of the wires in the electrical component of the unit which enabled the unit to function normally. He maintained that he

did so, as he knew the vessel would soon be sent for repairs. In summary therefore prior to the vessel being sent for dry docking on 17 January 2002, it had encountered hydraulic problems in October or November 2001, coupled with electrical problems with the reading of the pitch control, as well as the pitch propeller problem on 16 January 2002. Then after repair on 1 February 2002, while undergoing a test run, it was found that the MUP 21 card was defective, thereby giving rise to an electrical problem.

[43] On 4 February he confirmed that the master called him after the collision, telling him that there was a problem with the pitch control of the bow thruster unit. He confirmed that this problem, like that on 16 January 2001 related to the electrical system of the bow thruster unit. DW4 testified that when he went to inspect the power card box for the bow thruster unit located underneath the forward console on the bridge of the Red Gold, he was alone. He explained that on that day he opened the cover of the box without express permission from the master as he was the chief engineer. He confirmed that the cover could be opened by unscrewing two screws on the cover. He saw the cards in the electrical box but could not recollect how many there were. He stated that one of the cards was dislodged, in a slanting position. When asked how this could occur, as the card slot was such that the card could only be placed and displaced horizontally, the witness confirmed that he did not know how it had dislodged into that position. The chief engineer confirmed that the dislodgement of the card was serious as it could cause a collision. However no report was lodged with Rolls-Royce either for investigation or so as to ensure that it would not recur.

[44] He then called the master to have a look which the master did. Then the chief engineer repositioned the power card correctly. When it was put to the chief engineer that nowhere had he recorded the fact of the card being dislodged in the contemporaneous deck logs and engine logs, his response was that his English was poor. His statement in the deck log in English was that the problem was caused by a faulty electrical system whereby the pitch had no power. He explained that by that statement he thought it included the card as well.

[45] It was put to the chief engineer that the bow thruster pitch control stuck at 30 degrees starboard because there was no power in the bow thruster system. He agreed. He disagreed however that the problem arose because of a lack of sufficient maintenance. When asked about maintenance he stated that it was not necessary to effect measures to maintain the electrical system because the collision had not occurred. He stated that he had advised the service engineer about the electrical problems with the bow thruster. He denied all knowledge of the defective MUP 21 power card.

[46] In further support of the defence of inevitable accident, the owners called an expert, Nicholas Edward Haslam, DW2 ('Haslam') who is the managing director of one London offshore consultants private limited in Singapore. He served at sea for 20 years, achieving the rank of master, followed by thirteen years as a director of a marine consultancy and surveyor company in London and Singapore. He was instructed by the owners sometime in 2009 to provide an opinion on the incident of 4 February 2002. His opinion was based purely on the documentary aspects of the case. He did not have occasion to inspect the bow thruster unit as the report was commissioned seven years after the incident and as the unit had been replaced by that time. The scope of Haslam's report was to consider the maintenance system and regime undertaken by the owners, the response of the master to the malfunctioning of the bow thruster unit on 4 February and the failure of the bow thruster unit itself. His opinion was that the degree of maintenance undertaken by the owners was sufficient and that there was no requirement to check the electrical system of the bow thruster unit. On the basis that the owners were compliant with the international safety management code, although there was no need to do so until July 2002, he concluded that this was sufficient maintenance. In short he opined that the Red Gold was well managed, maintained and well manned, thereby precluding negligence.

[47] On the basis that the cause of the collision was the dislodgement of the power card from its seating, he concluded that as the unit had been fully serviced, and the card giving rise to the incident, replaced such that it was functioning satisfactorily, the incident was unforeseeable. He further maintained that it was not reasonable to expect the crew or master to have checked whether the card was in place or not. He concluded that nothing could have been done to prevent this incident.

[48] With regards to maintenance it was put to him that apart from the planned maintenance system which he premised his report on, it was necessary to actually consider the daily maintenance reports. He agreed and maintained that he did consider the same. He also agreed that the electrical system comprised a part of the bow thruster unit and that it therefore required regular servicing, with the proviso that this referred to user-servicable components. He concurred that the bow thruster system was a part of the vessel belonging to the owners and not to the manufacturers. In other words, the owners retained responsibility for the maintenance and functioning of the electrical component of the bow thruster system.

[49] He also accepted that the planned maintenance in relation to the bow thruster engine did not include the electrical system, but stated that there was a reason for this. He did not accept that there should have been a maintenance

system for the electrical system, although accepting at the same time that when the bow thruster fails it can cause an accident.

[50] In the course of cross-examination he was taken through the prior problems with the bow thruster unit that had occurred between October or November 2001 and again in early January 2001. He accepted that the bow thruster unit was malfunctioning to the extent that cargo operations had to cease on 16 January 2001. However he maintained that this was part of a continuing problem which began in November 2001. He also accepted that there was an electrical problem with the pitch indicator as of that date, which he categorised as being relatively unimportant. Haslam was unable to ascertain the reason for the defective MUP 21 card from DW1, the specialist Rolls-Royce engineer. He opined however that the dislodgement of the replacement power card on 4 February could possibly have been due to vibration. However he denied that the inevitable vibration occasioned to a vessel would cause such dislodgement. It was put to him that because any vessel is likely to encounter a certain degree of vibration whilst in operation, there is always a likelihood that the card could be dislodged from its seating. He agreed that at any time the card could vibrate which is why the unit is tested before it is used. When it was then put to him that there was therefore a need for a system of check and maintenance of the control box to prevent such a recurrence, he answered that it was not his intention to state that the inevitable vibration would result in the likelihood of the card being displaced and that in any event the system is tested prior to use on each occasion. This, he maintained, amounts to a check and maintenance of the functionality of the unit and was therefore sufficient. In short he maintained that nothing could have been done either to prevent the incident of 4 February from having occurred or to prevent such an incident from occurring in the future.

[51] Having considered the totality of the evidence of the chief engineer, DW4, the Rolls-Royce specialist engineer, DW1 and the expert, Haslam, DW2 the following matters arise for consideration.

WAS THE CAUSE OF THE FAILURE OF THE BOW THRUSTER UNIT ON 4 FEBRUARY THE DISLODGEMENT OF THE POWER CARD FROM ITS SEATING?

[52] The plaintiff, while maintaining that PW1 was advised from the outset that the cause of the collision was the dislodgement of the card in the bow thruster unit, does not unequivocally accept the same. The owners, it is maintained must show proof of this. Has this been done? This issue turns primarily on the evidence of the chief engineer, Suyarman who was the person who ascertained the fact of such dislodgement on the date of the incident approximately half an hour after the incident. He described in his evidence

how the card was displaced, in a slanting position and how he called the master to view the same. He also disclosed this to the Shell representatives when they came on board the vessel for an investigation two days later. In his contemporaneous notes in the deck and engine logs as well as an incident report filed by the master soon after the incident, there is no express reference to such a dislodgement of the card, merely to a faulty electrical system or the fact that power supply to the unit was cut off due to a faulty electrical system. The plaintiff points to this seeming lacuna and questions the validity of the chief engineer's finding. I have considered his evidence as a whole as well as the contemporaneous records. While I accept that the records do not accurately record the precise nature of the problem which the chief engineer was able to identify so quickly after the incident, this in itself does not warrant the inference that the card was not dislodged. I accept that the chief engineer and the master merely recorded the specific dislodgement as part of a more general problem with the unit as a whole and as a consequence of which, power to the pitch control of the bow thruster unit was cut off. The implication made by the plaintiff is that perhaps there was some other electrical fault with the bow thruster unit rather than the dislodgement of the power card. However there is insufficient evidence before this court to warrant such an inference. Accordingly on a balance of probabilities I accept the chief engineer's evidence that the replacement power card MUP 21 was dislodged from its seating.

[53] No clear explanation or reason has been put forward for such dislodgement. There is the evidence of the chief engineer and Haslam that it was probably due to vibration. However they cannot be entirely sure. As such it appears that the owners have put forward no clear explanation for the dislodgement of the card. The reason for the dislodgement of the card is significant because it is the proximate or effective cause of the collision. In these circumstances the court is left with no option but to conclude that:

(a) it cannot definitively pinpoint the reason for the dislodgement of the power card on 4 February 2002;

(b) it is possible that such dislodgement was caused by the vibration of the vessel.

WAS THE MALFUNCTIONING OR FAILURE OF THE ELECTRICAL COMPONENT OF THE BOW THRUSTER UNIT FORESEEABLE OR NOT?

[54] Again I have considered the entirety of the evidence relating to the problems encountered with the bow thruster unit of the Red Gold from November 2001 until 4 February 2002. As summarised above, there was a problem with the hydraulic portion of the unit in November 2001. There was also a problem with the pitch control panel of the bow thruster unit at this

time. This was documented on 29 November 2001. It has been pointed out that these problems are unrelated to the precise problem with the unit on 4 February in that they relate to different parts of the unit and were in any event repaired prior to the incident. Again there was a problem with the electrical component of the unit on 16 January 2001 resulting in work having to cease while the chief engineer dealt with the problem by dismantling a wire in a different part of the unit. When the vessel went for dry docking a day later and the unit was attended to by a specialist engineer, the norgear and the hydraulic parts of the unit specifically were overhauled and repaired. The specialist was clear that he was given no instructions to service the electrical components.

[55] Therefore this was not done. This seems to this court to be a clear lacuna in the maintenance of the bow thruster unit that had already given indications of requiring care by virtue of a different series of problems occurring over this period. The problem was compounded when the vessel actually did not function regularly during its test run. A cursory check by the specialist engineer disclosed a problem with the MUP 21 power card, ie precisely the same card that gave rise to the problem on 4 February. This card was found to be defective, although the nature of the defect has not been specified. It was replaced and during this time, the specialist engineer discovered the dismantling of the wire which he re-inserted. Thereafter the vessel was reported to be functioning well. However no explanation has been accorded as to the reason for the defective MUP 21 card. There was no check to ascertain whether or not the spare card was functioning well. DW1 maintained that he had placed the card securely in its seating. However as stated before there is no explanation offered as to why the card was displaced, save for the possibility of vibration.

[56] Given these facts as a whole, it appears to this court that a series of problems had been encountered with the bow thruster unit, particularly the electrical component between November 2001 and February 2002. When this is coupled with the fact that the chief engineer was able to ascertain the problem with the bow thruster unit within half an hour of the incident, without the aid of specialist engineers from Rolls-Royce, it follows that this is a problem that was easily discovered and was therefore foreseeable. In short the history of problems with the unit, which included problems with the electrical component, coupled with the ease with which the problem was ascertained and put right, suggest that the incident was foreseeable.

WAS THE SYSTEM OF MAINTENANCE EMPLOYED BY THE OWNERS ADEQUATE OR NOT? IS A VISUAL CHECK OF THE ELECTRICAL BOX FEASIBLE OR NECESSARY?

[57] The owners have pointed to the ISM maintenance procedures that they

implemented on board the Red Gold although such measures were not statutorily required until July 2002. I have considered the evidence produced by them showing that measures were taken to test the engine, which covers the bow thruster unit at 500 metres from destination. They have also produced evidence through DW1 and Haslam that it is not feasible for them to check on the power cards of the unit at any time apart from such times as the unit is sent for servicing or repairs to the specialist engineer. They maintain that it is simply not feasible for the crew to check so many cards. When the question of how such an incident may be prevented from recurring there is simply no answer, save that it is unlikely to do so. This seems to the court to be unsatisfactory.

[58] DW1 maintained that the control box of the electrical component was not accessible thereby, by implication precluding a check as part of regular maintenance. However he conceded in cross-examination that the box was in fact quite easily accessed by unscrewing two screws to gain access to the system. Therefore accessibility is not in issue. It does not require a specialist engineer to enable access. Again it was evident from events after the incident that the chief engineer gained access and identified the problem within half an hour of the incident. This again suggests that accessibility is not a problem and that the chief engineer at least, was perfectly competent to ascertain and put right the problem with the electrical box. However notwithstanding this, both DW1 and Haslam maintain, somewhat unconvincingly that a visual check or any form of maintenance is not feasible or possible. It is clear that there are only a few cards in the control box and that a check may be undertaken without great difficulty.

[59] More significantly, according to DW1 and Haslam there is no method of preventing the seemingly simple problem of the unseating or dislodgement of a power card. In other words, they both provide no solution to prevent such recurrence notwithstanding that the same problem could arise at any time and give rise to the same problem again, on one or several occasions. Such a conclusion appears to be somewhat strained and contrary to common sense. I am mindful of the fact that the current post-mortem of the incident enables the plaintiff to suggest precautionary measures to be undertaken with the benefit of hindsight. Notwithstanding this it seems to this court that it is simply untenable to conclude that such a 'defect' namely the unseating of a power card crucial to the functioning of the bow thruster unit, which can be easily rectified by inserting the power card back into its slot, should be viewed as an insurmountable obstacle which cannot be monitored by way of regular maintenance. This is particularly so when another incident of the same kind could result in a more serious collision. In other words given the nature of the 'defect' or failure which arose, the possibility of its recurrence and the methodology of prohibiting such recurrence, it is insufficient, in this court's finding to conclude that the same amounted to an unavoidable collision which

arose due to no fault or responsibility of the owners, their servants or agents. A visual check of the electrical box would have alerted the crew of the problem with the bow thruster cards. Accordingly a visual check on a regular basis would reduce the possibility of the recurrence of any such incident. I am not able to accept the opinion of Haslam or that of the Rolls-Royce specialist that maintenance checks are not possible because there are too many cards or because it is too cumbersome. As stated above, the number of cards in the electrical control box number three, and access is easily procured, thus facilitating routine maintenance checks.

[60] In this context the history of the malfunctioning of the bow thruster unit warranted a detailed servicing of the entire unit including the electrical component. I reiterate the history of problems with the bow thruster unit outlined above between November 2001 and February 2002. Notwithstanding this, the chief engineer did not see fit to brief the specialist engineer on this problem. Neither was an overhaul or maintenance of the electrical component of the bow thruster unit within the scope of work undertaken by him. Accordingly it follows that the electrical component of the unit was not accorded the degree of attention and care required in the course of its servicing to ensure that it would not malfunction again.

[61] The fact that the owners left the monitoring and servicing of the bow thruster unit to the specialist engineers does not relieve them of their responsibility for the malfunctioning of the same. The bow thruster unit is a part of the Red Gold and accordingly the owners remain responsible for any defect or fault, latent or otherwise, save and unless it can be categorised as an inevitable accident. If the fault for the dislodgement of the card is attributable to the acts or omissions of the Rolls-Royce specialist engineers. Than resource might have been had against than.

[62] The defendants also contend that they have put in place a sufficient checklist to ascertain the functioning of the bow thruster at 500 metres prior to arrival at any relevant location. Document VCL-03 prescribes the checklist to be followed in preparation for arrival at a base or platform. The specific checklist for equipment stipulates 'The engines to be tested and prepared for maneuvering'. The chief engineer and Haslam relied on the same to maintain that this was sufficient testing to ascertain the functioning of the bow thruster unit, as such testing effectively, it is said, tests the functioning of the bow thruster unit. This follows from the fact that if the bow thruster card is correctly positioned, it will function and if it is not, will cease to function. Accordingly if the engines are found to be maneuverable at the 500 metre mark, it may be inferred that the bow thruster function is regular. However in the instant case this was found not to be so. And similarly if the power card is displaced once again, such checking would again be insufficient. In other words, the

prescribed check does not alleviate the recurrence of this problem. It therefore cannot be said that the checklist meets the need to ascertain the functionality of the bow thruster unit specifically. A more specific checklist to address this problem is necessary as there is no evidence before this court that such an incident may not recur on one or more occasion. Accordingly I conclude that the compliance with the checklist at the 500 metre mark prior to discharge at the platform was insufficient to rebut or discharge the onus of maintenance on the owners. I am unable to conclude given the totality of the evidence that the owners had done all they could to prevent the collision. The fact that this may well be attributable to the acts and omissions of the Rolls-Royce sub-specialist engineers does not assuage the liability of the owners.

THE LAW

[63] In considering the defence of inevitable accident, particularly on the facts of this case, where the Red Gold collided with a stationery platform, the case of *The Merchant Prince* is particularly instructive. The facts have been set out above. There Lord Esher MR said in relation to inevitable accident:

> ... Inevitable means unavoidable. Unavoidable means unavoidable by him. That being so, there comes the proposition which Lopes LJ has put into form that a man has got to shew that the cause of the accident was a cause the result of which he could not avoid. If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid? That appears to me to be perfect reasoning ... What was the cause, the probable cause? I do not say it is proved. Is there a probable cause? Yes. This chain refused to act. That must have been the reason that they could not turn the wheel. It refused to act for a moment, and yet got right immediately after. If two of the links did kink as they went round the leading wheel, one can see for one's self, directly you try the thing what might happen. The gentlemen who advise us say that this is probably the way in which this happened, and they go further and say that it in all probability was the cause of this collision. If that was the case, how came it to happen? Why because the chain became too loose. That opens out what I said at first. If that is so, is not that stretching of the chain a thing which they could have foreseen, which they ought to have foreseen, and which if they had foreseen — not that it would do it but that it might do it — ought not they to have taken means on that morning to have had the other steerages ready to act in a moment, even if they ought not to have used those other steerages, and those other steerages alone? It seems to me in this case, from what one can see of the facts proved of the conduct of the ship here, to shew a probable cause, and if that was the cause it could have been avoided ...

[64] In the instant case, the power card MUP 21 situated in the electrical box was dislodged resulting in the pitch control failing to respond to any command. The pitch control of the bow thruster was 'stuck' at 30 degrees starboard because the power card was not functioning. As in the case above, it did not function, yet functioned normally immediately after it was re-inserted.

The chief engineer, Haslam and DW1 say that this is probably why the pitch control became 'stuck' and was the cause of the collision. If that was the case, how did the card become dislodged? According to DW1 and Haslam it was in all likelihood caused by the vibration of the vessel. Vessels do vibrate as a matter of course, particularly when the bow thruster is functioning. The dislodgement of the card by reason of the vibration of the vessel appears to be a thing which the owners or the Rolls-Royce specialists could have foreseen. If so they ought to have had means to ensure that the problem could be rectified or dealt with upon its occurrence. The cause, ie the dislodgement of the card could have been avoided by either a secure placement of the card so as to ensure that it does not fall out when the vessel vibrates excessively or that there is some visual check undertaken to ensure the secure placement of the card periodically.

[65] Put a different way, in this case the power card in the electrical box of the bow thruster unit failed when it was displaced or dislodged from its seating. How is that accounted for? It is not. However DW1 and Haslam express their opinions that the cause of the unseating was vibration. In these circumstances it appears to the court that there was a defect in the machinery or that there was a failure to have in place a system of maintenance to preclude such an occurrence. They had had problems with the bow thruster in the months and particularly the few days preceding the problem. The problem that arose in the test run, three days prior to the incident involved the same power card. In these circumstances it appears to this court that the irresistible inference to be drawn from the entirety of the circumstances of the case is that the problem with the power card was foreseeable and could have been avoided. It was not an unavoidable accident that the owners had done everything they reasonably could to prevent.

[66] Alternatively the vessel collided because the power card became displaced. However there has been no clear explanation as to why or how the card became displaced. The evidence adduced has all gone to show or prove the fact of displacement, rather than the reason for the same. The reason why the card became displaced remains the proximate or effective cause of the collision. In other words, save for the vibration or such other 'cause' that gave rise to the displacement of the power card, it would not have been displaced and the pitch control stuck. There has been no explanation afforded by the defendant of the effective cause of the displacement of the card. They have simply said that such an event never occurred prior to the incident and is unlikely to recur. But it did occur here, although the precise cause is not known. If the precise cause of the dislodgement is not known, how is it possible for the defendants to show that this was a cause which they could not avoid? Applying this alternative contention too, it appears that the owners are unable to establish that the accident was inevitable or unavoidable. On the contrary, the evidence appears to show that such an incident whereby the power card is dislodged is avoidable

by undertaking a visual examination of the card periodically or securing the same so as to preclude dislodgement as a consequence of vibration.

[67] The owners point to the cases of, inter alia, *The Spider* (1932) 43 Ll L Rep 217 and *The Aralia* (1949) 82 Ll L Rep 884 in support of their defence of inevitable accident highlighting pertinently that the onus is on them merely to show a way in which the accident may have occurred without negligence. In other words the owners have only to give a reasonable explanation, which if accepted, is an explanation showing that the accident happened without their negligence. If that explanation is equally consistent with the accident happening without their negligence as with their negligence, the onus shifts back to Shell to show (and the burden always remained with Shell in any event) that it was the owners' negligence that caused the accident (see *The Kite* [1933] P 154). Applying the same principle to the facts of this case the issue is whether the dislodgement of the power card amounts to a reasonable explanation for the accident and whether such dislodgement occurred without the negligence of the owners, their servants or agents.

[68] In *The Spider* the owners of the Spider, a wooden barge, brought an action against the owners of a steam crane and grab attached to a wharf for damage done to the barge through the breaking of a chain attached to the grab while unloading ballast from the barge. The barge-owners, the plaintiffs, maintained that the accident was due to negligence while the defendant crane owners said that the accident was caused by a latent defect in the weld which it was impossible to detect. As is the case here the doctrine of res ipsa loquitur was applied and the onus of proving that the accident was not due to the negligence of the crane owners was on the defendants. The court heard evidence on the state of the chain and its links which had given way giving rise to the accident. The learned judge made an express finding that '... there was a very serious flaw in the inside of the scarf or weld which could not be seen by any known means.' Accordingly he concluded that the defendants could not be held responsible for the link giving way as they could not have detected the latent fault. He was satisfied that there was a secure system of checks in place to ascertain the strength of the chain routinely. The court there therefore found that there was a reasonable explanation which effectively rebutted or discharged the onus on the defendants and shifted the onus back to the plaintiffs to establish negligence which they failed to do.

[69] In the instant case it cannot be said that the dislodgement of the power card in the electrical box of the bow thruster unit amounted to a flaw which could not be seen or discovered by any known means. The dislodgement of the power card could quite easily have been detected by a visual inspection of the electrical box. As stated earlier, this is borne out by the ease with which the 'defect' was discovered without the assistance of any specialist engineer but by

the chief engineer within half an hour after the incident. I have dealt with access to the electrical box earlier. In these circumstances, I cannot conclude that the instant case can be likened to that of *The Spider* where the facts showed that:

(a) there was a satisfactory system of checking in place routinely; and

(b) there was a serious latent flaw or defect in the weld of the chain which could not have been discovered by any known means.

[70] While I accept that it was not the practice of the crew to inspect the electrical box regularly to check on the cards, it does not therefore follow that it is not possible to have conducted, or to put in place a system of routine visual checks to ensure that the power cards are securely lodged. There are three cards in the bow thruster unit. Accordingly I am unable to accept that the explanation of the dislodgement of the power card from its slot amounted to an unavoidable accident which the owners, their servants or agents could not have detected with the exercise of reasonable care and maritime skill.

[71] Even if I am wrong and a system of visual checks for the electrical box of the bow thruster unit is not practical, then the fact remains that the card would not have been dislodged if it had been securely fastened, when the defective MUP 21 card was replaced on 1 February 2002. The error or omission in ensuring that the card was securely fastened amounts to an error or omission on the part of the owners' agent or contractor, for which the owners remain liable. While as said earlier it was open to them to join the contractor as a third party and seek an indemnity, this does not serve to discharge the onus placed on them to show that the accident would in any event have occurred without their negligence. In other words, it cannot be said that all reasonable care and maritime skill was exerted by the owners, their servants or agents.

[72] In *The Aralia*, a barge known as the Aralia was left in the hands of the defendants for purposes of repair. The barge was moored by the defendants by means of breast ropes to other barges which were in turn secured to the wharf. The Aralia was the eighth barge out. It was so moored prior to a holiday and found adrift after the holiday. The suggestion was that the barge was possibly struck and had broken adrift or broke adrift owing to wash caused by a ship passing at excessive speed. The court here found that the defendants had provided a reasonable explanation of how the accident might have occurred without any negligence on their part and that accordingly the onus shifted back to the plaintiffs to affirmatively prove negligence on the part of the defendants, which they failed to do. In this case, the court with the assistance of advisors found that:

(a) The rope used for mooring was of the standard type universally used by barges in the port of London and that what was left of the rope shows that

it still retained its strength. In other words, there was no defect in the quality of the mooring rope used by the defendant.

(b) The system of mooring was also found to be satisfactory on the basis of the evidence adduced relating to the system utilised by the defendant.

[73] In these circumstances the court was satisfied that the defendant had rebutted or discharged the onus on it to provide a reasonable explanation for the accident without its negligence. In the instant case, the defect arises from the dislodgement of the power card for which no explanation is provided. There is no system in place to preclude such dislodgement from having happened or from happening in the future on the grounds that it is simply not practical. This, as I have said does not appear to be satisfactory because it does not establish that the accident would have happened either with or without the negligence of the owners, their servants or agents. I reiterate my earlier comments that:

(a) There is no real explanation as to why the power card was dislodged. In the absence of any pertinent explanation for the dislodgement, it is not possible for the court to ascertain that the owners, their servants and agents did in fact do all that they could to preclude or prevent such an occurrence.

(b) Haslam somewhat hesitantly, surmised that the dislodgement could have been due to vibration as did DW1, the expert engineer from Rolls-Royce and the chief engineer. If so, then given that vessels do vibrate in the course of their being operational, it is incumbent upon the owners, their servants or agents to ensure that there is a system in place to preclude the dislodgement of the card. There is no such system in place in the instant case. That appears to be a lacuna in the system of management adopted.

(c) Even if the dislodgement can be attributed to a failure to secure the card properly when it was replaced three days prior to the incident, allowing for the vibration of the vessel to displace it, then such omission must lie with the contractor or sub-specialist Rolls-Royce, which fact does not relieve the owners of responsibility for the secure fastening of the power card.

[74] As has been stated in the course of the evidence, there are numerous power cards in place in a vessel today and should one or more of them become displaced this would have serious consequences in a vessel that was underway. Loss of control is a serious issue and it appears to this court insufficient for owners of a vessel to seek to relieve themselves of liability for the malfunctioning of equipment on board their vessels by pointing to their sub-contractors or agents. As with any vehicle, if there is a malfunction in the

equipment leading to a collision particularly with a stationary vehicle, it ill behoves the owner to deny liability for the accident on the grounds that fault may be attributed to a sub-contractor.

[75] For these reasons, I conclude that the circumstances of the instant case differ significantly from that in *The Spider* and *The Aralia*. In both those cases the defendants provided a reasonable explanation whereby they showed that the accident would have occurred without negligence on their part. Here the owners have not established that the accident would have occurred even without their negligence. The evidence discloses that the power card was not securely placed or fastened so as to be immune to vibration. There was moreover no system of visual check in place to preclude such an occurrence. It is evident that the collision was caused by a defect in the electrical box of the bow thruster unit, even if momentarily, when the power was cut off. The defect could have been rectified or avoided by a proper securing of the said power card and a system of routine visual checking. In these circumstances it cannot be said that the collision would have occurred even without the negligence of the owners, their servants or agents. Accordingly the defence of inevitable accident fails in that the owners have failed to rebut or discharge the onus on them to provide a reasonable explanation for the collision and that it would have, in any event, occurred without their negligence. Given this conclusion the onus does not shift back to Shell, as the plaintiffs to prove negligence.

[76] A further point on liability is that pertaining to the acts or omissions of the master in the course of dealing with the incident whereby the pitch control of the bow thruster unit was immovable at 30 degrees starboard. Shell have pleaded several particulars pertaining to the negligent acts and omissions of the master for which they allege the owners are vicariously liable. I have perused the evidence and considered the same in this context and conclude that there is no evidence of negligence on the part of the master in dealing with the situation. It appeared to this court that from the accounts of the incident, the master realised very quickly that the pitch control was stuck and took all the relevant emergency action such as turning off the bow thruster emergency button and turning on the alarm. He also managed to steer the vessel away from the platform by utilising the forward engines. I accept the evidence of Yohan Pada, DW3, the chief engineer, DW4, the expert, Haslam DW2 and find that there was no negligence on the part of the master in this incident.

[77] Finally with regards to the issue of contributory negligence, I find that there was no contributory negligence on the part of Shell in not providing mooring ropes at the point of discharge at the platform. The lack of such facilities was known to the owners at the outset of the charter party agreement and there was at no time any complaint or request for the same. The owners of the Red Gold knew or ought to have known that for the duration of the seven

and a half months, under the term of the charter party, the vessel would have to perform snatch and lift operations alongside the platform without the use of mooring ropes or anchor. Accordingly there appears to be no basis for apportioning a degree of liability to Shell for the collision.

Issue (iv): Are the owners entitled to limit liability under the Merchant Shipping Ordinance due to the absence of actual fault or privity on the part of the owners? If so, what is the quantum of that limitation amount?

[78] The Merchant Shipping Ordinance 1952 makes provision for the owners to limit their liability. The owners will be entitled to limit liability if the collision was not caused by their actual fault or privity. The burden lies on the owners to establish the absence of actual fault or privity. The owners contend that there is an absence of actual fault or privity on their part for the following reasons:

(a) They had prepared for and implemented on the Red Gold at the time of the collision an international safety management manual ahead of compulsory international requirements. This they contend provides a comprehensive system of safety management and maintenance of the vessel which complies with international standards. They also point to an a planned maintenance system which provides for a weekly, monthly, three monthly, six monthly and annual maintenance of all the vessel's equipment and machinery. This, it is contended shows that there is in place a more than adequate system of safety management and maintenance. More specifically with regards to the bow thruster, reference is made to the requirement for and implementation of checks on the hydraulic pump in both January and February 2002. They further rely on the evidence of DW1, the specialist engineer from Rolls-Royce who confirmed that the maintenance system with regards to the bow thruster on the Red Gold was sufficient. When asked whether there should be included a system of inspection of the power cards by the crew, he responded that the commissioning and set up of the bow thruster is conducted by a specially trained engineer from the factory and the crew are not allowed to do further adjustments.

[79] PW1 it is said also confirmed that the safety management system was sufficient. A perusal of his evidence in relation to the maintenance of the bow thruster discloses that while there is a system in place for the bow thruster, this pertains to the mechanical portion only.

[80] Finally the expert, Haslam, DW4 also confirmed on behalf of the owners that nothing more could have been done in the safe management of the vessel to avoid the collision. He stated that problems with equipment and

machinery on a vessel are common, particularly a vessel of 20 years. He confirmed that it is common for electrical problems to arise on a ship. Such a problem which falls outside the capabilities of the crew or requires the service of specialist operators would be contracted out. He further stated that as the owners had based their maintenance on the recommendation of specialist manufacturers of the equipment, this was more than sufficient.

[81] In response to this the plaintiff points to the fact that there is no evidence to show that there was a safety management and maintenance system in relation to the electrical system of the bow thruster.

[82] I have considered the evidence of DW1, the specialist engineer from Rolls-Royce, DW2 namely that of Haslam, Suyarman, DW4 as well as PW1, although the latter is less relevant. Having done so it is evident that it is not in dispute that there is no provision in the ISM manual for any checking of the electrical system of the bow thruster unit. It is also not in issue that the electrical component of the bow thruster unit comprises an integral and essential part of the bow thruster. Again it is relevant that DW4, the chief engineer, Suyarman was able to ascertain the problem with the electrical component of the bow thruster easily and within a short time of the collision. It is also evident that it did not require specialised expertise to either gain access to the electrical box (by unscrewing two screws on the cover) or for the re-insertion of the power card into its slot such that it was re-secured safely whereupon the vessel functioned normally.

[83] Given the latter fact I find it difficult to accept the evidence of either DW1, the specialist engineer or DW2, Haslam when they state categorically that no maintenance of this equipment on the vessel, which is critical for the purposes for which the vessel was chartered, requires any form of maintenance or inspection. Their only advice is that if there is a malfunction, then the specialist engineer ought to be called in. There is no remedy or precaution afforded by either of these two witnesses to prevent or avoid such an incident from recurring. There is also no response suggested or advised in relation to the response to be undertaken in the event of such an emergency on the part of the crew. When this is considered in conjunction with what Suyarman, the chief engineer actually did after the collision as outlined above, then the stance taken by both these witnesses appears to this court to be untenable. In so far as DW1 is concerned, it is evident that the replacement MUP21 card was not secured sufficiently resulting in the card being displaced, possibly or probably due to vibration. He is to that extent a key player or participant in the events leading up to the collision. His contention therefore that nothing can be done, save to once again call a Rolls-Royce engineer to re-insert a displaced card is less than credible. Similarly with Haslam. He does not appear to provide a clear expert

A view point on the steps to be undertaken in the event of the recurrence of a power card being displaced from its slot.

[84] Neither does he explain how or why the card was displaced, save for the somewhat hesitant suggestion that it was probably due to vibration.

B

[85] Accordingly I am unable to accept their evidence which fails to deal with the fact that the problem was dealt with expeditiously after the incident, and that it could have been avoided by a routine inspection of the placement of this power card, along with others.

C

[86] The fact that there is no maintenance system in place to inspect the secure placement of the electrical component of the bow thruster unit which is a critical part of the bow thruster unit appears to be a lacuna in the ISM Manual promulgated and practiced by the owners. I have no reason to doubt and accept that such a system of safety maintenance was practiced and utilised by the owners of Red Gold. But that cannot detract from an absence of any system of maintenance for the electrical component of the bow thruster unit. This is further apparent from the owners' insistence that even after the collision no system could be put in place to prevent the recurrence of such an incident.

D

E

[87] The use of power cards in various critical parts of the vessel does not obviate the need for inspection and maintenance of these electrical components. The fact that there are numerous power cards employed in the regular functioning of the vessel underscores the need for a system of maintenance and inspection of these crucial cards. A system that provides for regular maintenance and inspection of the power card in the electrical component of the bow thruster unit as with other power cards is important to establish a comprehensive safety and maintenance system. The contention that nothing need to be done or in fact can be done about the possible displacement of power cards such as the MUP 21 card is unsatisfactory.

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[88] In arriving at this conclusion, I have considered the evidence of the owners' witnesses that the vessel was classed and had a good system of maintenance in place. However as stated above it is not in issue that there is nothing in place with regards to inspection of the electrical component of the unit (as is evident from a perusal of the PMS system for the bow thruster unit). The fact that it was classed and otherwise in good condition does not override the need for a planned maintenance system for this component. I have also considered the evidence relating to the use of directive VCL-3 in the manual which requires compliance upon entering the 500 metre one, arrival and departure points. One of the directives requires the engines to be tested and prepared for maneuvering. The owners contend that the use of VCL-3 is

H

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sufficient as if the bow thruster unit was not functioning it would be detected at that point, and the vessel would not proceed further.

[89] While it cannot be disputed that VCL-3 is effective in ascertaining the functioning of the engines including manoeverability, it is clearly insufficient to preclude or avoid an incident such as the displacement of the power card in the bow thruster unit. Despite the practice of VCL-3 including the testing of the engines, the pitch control of the bow thruster unit malfunctioned. VCL-3 therefore, while ensuring the functionality of the engines, does not alert the master to the possibility of an electrical malfunctioning as in the instant case. In fact given the use of power cards throughout the vessel, it cannot be discounted that other power cards might thus be displaced. There is no system in place to ensure that they are all sufficiently secured or placed properly.

[90] Considering the totality of the evidence in relation to the system of maintenance and safety management particularly for the bow thruster unit, it appears to this court that the owners have not discharged the burden of showing that they did all they reasonably could to put in place a system of maintenance for the regular inspection of the power cards in the bow thruster unit. This conclusion is fortified by the clear position adopted by the owners that there were no steps taken nor intention evinced after the collision to implement any system of checking albeit visual or otherwise. The suggestion that any remedial steps be taken after the occurrence or recurrence of such an event is unsound.

[91] The malfunctioning of the electrical system of the bow thruster unit in the months preceding the collision put the owners and managers on notice that the system was not functioning optimally. Notwithstanding this, no instructions were given for the overhaul or repair of the electrical system of the bow thruster. It is evident from the evidence of Suyarman, DW4 that despite having knowledge of the electrical problems which he set out in his daily log, no communication of this express problem was made to DW1. The owners would have been appraised of the problems with the bow thruster unit, which it appears they were, as it was sent for repairs in January 2002. Notwithstanding this the owners did not see fit to instruct or ascertain that all critical components of the unit were functioning fully.

[92] The fact that DW1 did not fully ascertain the cause of the faulty MUP 21 card and simply replaced it with a spare replacement card ought to have alerted the owners as to the possibility of malfunctioning of this portion of the unit. As it happened the malfunctioning was due to a simple displacement of the power card which could have arisen from vibration or faulty emplacement of the card in its slot. Whatever the case, there is no system in place to check such a fault or any similar fault which can recur not only in the bow thruster

unit but in other critical areas of the vessel where cards are similarly used. In all these instances it is not possible to leave the maintenance and safety of their emplacement to be addressed only when and if an accident or malfunction arises. Accordingly despite the existence of an ISM manual and its practice on board the vessel, the same is insufficient to ensure the safety and maintenance of the electrical component of the bow thruster unit.

[93] As for Shell's verification of the safety standards of the vessel and acceptance of the same, it must be said that the onus does not lie on Shell to ascertain the safety and maintenance procedures in place in the vessel. To that extent PW1's statements on this subject are less than material.

'ACTUAL FAULT OR PRIVITY' UNDER THE MERCHANT SHIPPING ORDINANCE

[94] The word 'privity' was interpreted by Lord Denning MR in *Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The 'Eurysthenes')* [1976] 2 Lloyd's Rep 171 in the Court of Appeal. In doing so he examined the origin and history of the development of the concept of 'fault or privity' in earlier statutes which are relevant for the purposes of the Merchant Shipping Ordinance 1952:

> ... According to the old common law, the master of a servant was only responsible for the acts of his servant if they were done 'by his command or with his privity'. But, if the acts were done by the servant in the course of the master's service, and for his master's benefit, they were presumed to be done by the authority of the master 'although no express command or privity of his master was proved'.... On the other hand, the owner of a ship was absolutely liable for the loss of goods, because he was a common carrier and liable by custom of the realm, even though they were stolen without his fault or privity. That was settled in 1674 in the great case of *Morse v Slue* (1674) 1 Vent 190. It operated so harshly on shipowners that in 1734 Parliament passed the first of the MSAs saying that a shipowner was not to be held liable for any loss or damage occasioned by the master or mariners 'without the privity and knowledge' of the owner to an amount greater than the value of the ship. This was followed by a succession of MSAs, all of them directed to limiting the responsibilities of the shipowner for the acts or defaults of his servants. He was not to be liable for acts done 'without his fault or privity' beyond the value of the vessel. The object of these Acts was to limit his liability for his servants on the basis of respondeat superior, but to leave him fully liable for faults done by himself personally or with his privity This distinction underlies the provision of the MSA 1894, which limits the liability of a shipowner for damage or loss of goods which takes place 'without his actual fault or privity' but leaves him fully liable for acts done by his actual fault or privity.

[95] This historical survey shows to my mind that, when the old common lawyers spoke of a man being privy to something being done, or of an act being

done 'with his privity', they meant that he knew of it before hand and concurred in it being done. If it was a wrongful act done by his servant, then he was liable for it if it was done 'by his command or privity', that is with his express authority or with his knowledge and concurrence. 'Privity' did not mean that there was any willful misconduct by him, but only that he knew of the act beforehand and concurred in it being done. Moreover, 'privity' did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it. Hence in the later MSAs, the owner was entitled to limit his liability if the act was done without his 'actual fault or privity'. Without his actual fault meant without any actual fault by the owner personally. Without his 'privity' meant without his knowledge or concurrence.

[96] Such is, I think, the meaning we should attach to the word 'privity' in s 39(5). If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred. To disentitle the shipowner, he must, I think have knowledge, not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry so that he should not know it for certain — then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.'

[97] Thus without the 'actual fault' of the owners means without any actual fault by the owners personally, and the fault of an inefficient manager appointed by the owner would be imputed to the owner as a matter of law in a sense of being his actual fault or a fault committed with his privity. Without his privity means without his knowledge of and concurrence in the faults of others, but not necessarily amounting to willful misconduct.

[98] In *Grand Champion Tankers Ltd v Norpipe A/S and others (on appeal from The Marion)* [1984] AC 563 the vessel's anchor fouled an oil pipeline on the seabed causing damage to it due to the negligence of the master, who was relying on out-of-date charts. The owners had delegated the management fo the ship to third party managers, an English company. It was the managers duty to oversee that there were up-to-date charts on board and that the master used them. There was evidence that the master was in the habit of using obsolete maps and that had he used the new charts, he would have seen the position of the pipeline, so the accident would not have happened. Upon a claim made by the pipeline owners, the shipowners admitted liability but sought to limit their

liability under s 503 of the Merchant Shipping Act 1894, as amended. The issue for the court was whether the damage occurred without the owners' actual fault or privity.

[99] The questions to be decided by the court were: (a) What action should have been taken by the managers as reasonably prudent ship managers to ensure that *The Marion* was supplied with up to date charts? (b) If the answer to this question showed that there was fault on the part of the managers was that fault a fault for which the owners were liable upon the footing of the respondent superior or was it the fault of somebody for whom the owners were liable because his action was the very action of the company itself?

[100] At first instance, the judge held that there was no fault on the part of the managers so he allowed the limitation. He was overruled by the Court of Appeal, which held that the owners had not established that the casualty was caused without their actual fault or privity. The shipowners appealed to the House of Lords. The issue there was whether the managers had, in their management and operation of *The Marion*, a system by which the managing director ensured that an adequate degree of supervision of the master to keep and observe the up to date charts was exercised, either by himself or by his subordinates. Although, in the absence of the director his subordinate had written to the master asking him to utilise the new charts, there was no follow up to ensure that the master did so. A report from the flag state, Liberia showed that he had omitted to follow this up and ensure that the master used the new maps. The director was in communication with the office but was not aware of the report. The House of Lords in its judgment inferred from this that the director's instructions in this respect to his subordinates was insufficiently clear. Accordingly they found that the system of supervision was defective. Confirming the decision of the Court of Appeal, Lord Brandon said:

> ... My Lords, in the result, I conclude that there were two actual faults of the appellants: first in Mr Downard's (director of the managers) failure to have a proper system of supervision in relation to charts; and secondly in failing when he departed to Greece to give to Mr Lowry and Mr Graham (his subordinates) instructions with regard to the matters about which he required to be kept informed which were sufficiently clear, precise and comprehensive.

[101] Lord Brandon approved the approach taken in *Rederij Erven H Groen and Groen v The 'England' (Owners) and others* [1973] 1 Lloyd's Rep 373 where it was held that it was not sufficient to appoint a competent master and delegate all matters to him for the owners or managers to discharge their responsibilities. It was held that on the facts of the case in *The Marion*, the manager ought to have realised that the master had a propensity to navigate with obsolete charts, requested him to stop doing so, and in the event he was incapable of reform to have relieved him of his command as captain. It was reiterated as in The Lady

Gwendolen that shipowners must accept the obligation to ensure efficient management of their ships if they are to enjoy the very considerable benefits conferred on them by the statutory right to limitation. Accordingly the owners were not able to limit liability because the fault of the manager constituted as a matter of law, the actual fault of the owners, and such fault caused or contributed to the damage of the pipeline.

[102] In the instant case before the court, as outlined earlier, it is evident that there was simply no system of checking the secure placement or fixation of the power card which comprises an integral part of the electrical component of the bow thruster system. There is no evidence before this court that the owners or their managers implemented any system of checks for the electrical component of the bow thruster system, notwithstanding that there were defects in that component even prior to the vessel being sent for repairs. Notwithstanding the problems with the test run after the repairs, no system was put in place to check on the electrical system of the bow thruster. Neither is there any proposal to do so in the future as has been discussed above. In these circumstances it appears that the owners ought to have, in conjunction with the introduction of the ISM manual put in place a general system of checks for the testing and visual inspection of the electrical component of the bow thruster unit specifically and the failure to do so deprives them of their statutory right to limit liability.

[103] In the Singapore decision of *The 'Sunrise Crane' [2004] SGCA 42* [2004] 4 SLR 715 the vessel was a chemical tanker which arrived in Singapore to discharge a cargo of nitric acid. It was found that some of the nitric acid in one of the vessel's tanks had been contaminated by hydraulic oil. The contaminated cargo had to be disposed of by safe means, as nitric acid is extremely corrosive. The owners of the Sunrise Crane requested their P & I club to assist whereupon a surveyor was appointed to locate a suitable licensed contractor to remove the contaminated cargo. One of two possible contractors was contacted and it was agreed that the contaminated cargo would be transferred onto the contractor's vessel named the Pristine outside port limits. The court found that the licensed surveyor had advised the contractor that the cargo to be transferred was contaminated nitric acid. Unfortunately the Pristine was constituted of mild steel and was incapable of carrying nitric acid. Once the contaminated nitric acid was transferred to the Pristine, smoke was seen coming out of it. The vessel also listed a little to port and eventually capsized. The crew from the Pristine were evacuated to the Sunrise Crane. It was common ground that prior to the transfer, no one on board the Sunrise Crane informed the crew of the Pristine that the substance to be transferred was contaminated nitric acid. In these circumstances, the owners of the Pristine brought an action against the owners of the Sunrise Crane for failing to inform the Pristine of the nature of the cargo immediately prior to the transfer. The owners of the Sunrise Crane responded that they had engaged an independent

contract to dispose the cargo who had been fully advised and therefore did not woe any duty of care to the Pristine. Alternatively it was pleaded by the owners of the the Sunrise Crane that they were entitled to limit their liability under the Singapore Merchant Shipping Act (Cap 179). The High Court found in favour of the owners of the Pristine and that the owners of the Sunrise Crane were not entitled to limit their liability. In the appeal against the decision of the High Court, Judith Prakash JCA (in a dissenting judgment) held that the owners were not entitled to limit liability under the Merchant Shipping Ordinance (which is in pari materia to the Malaysian statute). The majority of the Court of Appeal agreed with what was stated on the issue of limitation of liability:

> ... Although it would appear from the above explanation of the meaning of 'actual fault or privity' (here referring to the definition adopted by Lord Denning in *The Eurystenes* which I have referred to earlier) that it would not be very difficult for a shipowner to show that any particular negligent act in the management or navigation of his vessel occurred without his fault or privity, the courts do not favour limitation and, as the cases developed over the years, the opposite proved to be the case. A survey of the cases on the issue cited by the appellant itself shows that the threshold to cross before a defendant can avail himself of the limitation defence is very high ...

[104] The learned judge then proceeded to survey several cases including *Northern Fishing Company (Hull) Ltd v Eddom and others (The 'Norman')* [1960] 1 Lloyd's Rep 1, *Rederij Erven H Groen and Groen v The 'England' (Owners) and others* [1973] 1 Lloyd's Rep 373, *Grand Champion Tankers Ltd v Norpipe A/S and others (on appeal from The Marion)* [1984] 1 AC 563 (dealt with above) before analysing the fact situation in *The Sunrise Crane* and concluding that the owners of the vessel had a duty of care to ensure that there was a proper system on board the vessel when dealing with dangerous cargo, in particular in relation to the transfer of such cargo between vessels or between the vessel and a shore installation. No evidence was given of the existence of any such system. On the limitation of liability Her Ladyship concluded as follows:

> ... It is clear from the cases I have cited that, over the years, the courts have whittled down the protection available to a shipowner from the 1957 Convention and s 136 of the Merchant Shipping Act. There is hardly a reported case after *The Norman* where an owner has managed to show that the systems of management of the vessel were such that they in no way contributed to any negligence on the part of the crew of the vessel. Thus the purpose of s 136 has to a great extent been negative and the protection it offers to shipowners is, largely, illusory. That development was a major reason why many countries, including the United Kingdom, moved away from the 1957 Convention and adopted the 1976 Convention instead. Under the 1976 Convention the monetary limits are much higher but the benefit to the shipowner is that in almost every case he will be able to limit because the right to limit is only lost if it is proved that the loss sued for 'resulted form his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'.

[105] I would most respectfully agree and adopt the reasoning set out by the learned judge above in relation to the limitation of liability under the Merchant Shipping Ordinance 1952. The onus on the shipowners is heavy and in the instant case for the reasons I have outlined above in the prior analysis, I conclude that there appears to be no basis to limit liability in the instant case. I reiterate that the shipowners have failed to adduce evidence of the existence of a system for the maintenance and checking of the electrical component of the bow thruster system and more generally for the secure placement of power cards in that unit.

[106] The owners point to the cases of *Liong Ung Kwong v Kee Hin (M) Sdn Bhd & Anor* [1997] MLJU 260 ; [1997] 1 LNS 300 and *The Humorist* (1946) 79 Lloyd's Law Report 549 to support their contention that liability ought to be limited in the instant case. The former is a case of damage caused to cargo on board the vessel when she listed during loading. The explanation for the listing was that the hull of the vessel was punctured by H-beam structures embedded in the seabed where the vessel berthed for her loading. The H-beam structures were not indicated in any admiralty charts and therefore the owners could not have known of their presence. The puncture took place when the tide became low and the bottom part of the hull was effectively sitting on the seabed. In these circumstances the court concluded that there was no fault or privity on the part of the owners as there was no issue on the seaworthiness of the vessel. The cause of the loss was the puncture to the hull as a consequence of an external structure. The ship itself was otherwise sound. In the instant case however the cause of the collision was a defect in the electrical system of the bow thruster unit when the card became displaced. That is an inherent defect in a critical system of the Red Gold. As such it cannot be said that the fault was caused by an external factor outside of the control of the crew or the owners. The fact that it was rectified to normalcy within half an hour of the incident bears this out fully. Accordingly the case of *Liong Ung Kwong v Kee Hin (M) Sdn Bhd & Anor* is distinguishable.

[107] Similarly in *The Humorist* the vessel as at berth during loading operations at low tide when the bottom part of the hull came into contact with certain structures called weights which were prismatic shaped iron structures. The defendant shipowners asserted their right to limit liability on the basis of no actual fault or privity on their part. The court agreed as it was found that the casualty could not have been averted even by the defendant's agent who was supervising the loading operations. Again in this case there was no inherent defect in the ship. The cause of the casualty was an external factor which was outside the scope of responsibility of the shipowners. There was also a clear and cogent explanation for the accident. In the instant case, it is evident that the defect giving rise to the accident was an inherent defect in the vessel, namely the defect in relation to the displacement of the power card of the bow thruster

system. It cannot be said that the collision in the instant case was caused by an external factor outside the scope of responsibility of the shipowners. In the instant case there was no evidence adduced to establish how the electrical component of the bow thruster unit was maintained. Morever the evidence disclose that there isno proposal or plan in place to prevent the recurrence of such an incident, notwithstanding that it could easily have been prevented by implementing a periodic system of checking. This is borne out, as stated earlier, by the speed and accuracy with which DW5 righted the entire situation by simply placing the relevant power card properly. It cannot be said that this could only be done by a specialist engineer such as PW1. Accordingly I conclude that the owners are not entitled to limit liability under the Ordinance.

Issue (v): If liability is made out against the owners in the collision action has Sarawak Shell established or proved the loss and damage suffered?

[108] Having concluded the issue of liability in Shell's favour the next issue that arises for consideration is the issue of damages. Shell claims RM1.5m in damages for the repair of the D-35Q-A platform. It is not in dispute that the platform was damaged by reason of the collision. As such it follows that repairs had to be effected to the platform.

[109] The burden lies on Shell to prove the damages it seeks. In support of its claim Shell called two witnesses, namely Chong Chee Kuan, PW3 ('PW3') and Sim Theng Hiok, PW4 ('PW4').

[110] In 2002 when the repairs were undertaken PW3 was a senior operation engineer with Shell who was responsible for, inter alia, managing contract works. He was involved in daily liaison with the contractors to manage the works and to ensure that all such work was carried out satisfactorily and completed in accordance with the terms of the contract. PW3 was involved in the repairs to the damage to the D-35 Q-A platform. PW3 testified that at that time the only contractor doing major maintenance work for Shell was one Sarku Engineering Services Sdn Bhd ('Sarku'). They carried out the repair works on the damaged D-35Q-A platform. PW3 went on to explain the normal procedure undertaken for the arranging of repair work by Sarku. He testified that in the instant case, like all others, he approached Sarku for a price quote. Having procured this, he verified the quote against the works required to be done and then conducted further negotiations with Sarku. After the negotiations, a work order together with the technical proposal and schedule of payment was issued. The work order was produced in evidence and PW3's consent to the work order dated 23 January 2003, is evidenced by his signature on the same together with that of PW4.

[111] PW3 then explained that Sarku commenced the repair works on the D-35Q-A platform thereafter and completed the work in May 2003. The completion certificate was produced in evidence. Handover of the works was carried out on 27 September 2003. PW3 testified that Sarku submitted three invoices with supporting documents and corresponding payment certificates, which he checked. According to PW3 he checked to ensure that the work done set out in the documents complied with the work order and that verification had been approved by the company site representative. The latter was tasked with the physical verification that the work was completed. In other words PW3 checked that the work stated to be done by Sarku had in fact been completed as physically verified by the company site representative. When satisfied that the works had been completed he signed on payment certificates certifying that the work had been completed.

[112] The documents were then handed to one Robin Lusong who was in charge of contracts compliance. After this the invoices and payment certificates were handed together with the supporting documents to PW4 for his approval for payment.

[113] PW4 also testified. In 2002 he was the team leader of the diving construction and planning divisions of Shell. He explained that he was aware of the repair bill involving the D-35Q-A platform as he had approved the payment of the same. He certified that three invoices were issued by Sarku for work done on 11 July 2003, 14 August 2003 and 24 November 2003. These invoices were accompanied by supporting documents and the payment certificates. He approved the payment after he was satisfied that the requisite checking and verification process been complied with. This meant that he was satisfied that PW3 and Robin Lusong had signed off on the payment certificates. He testified that once he had approved the payment as evidenced by the payment certificates, the system generated the payment. The total amount paid was RM1.5m comprising a sum of RM1,425,000 for the actual work done and another sum of RM75,000 being for the close out report which was prepared after completion of the work.

[114] The owners maintain that Shell has failed to prove the loss it suffered submitting that the foregoing does not amount to credible or admissible evidence of the purported costs of repair of RM1.5m. Further it is contended that there is no proof that this sum was actually paid by Shell to Sarku or that such payment relates strictly to the repair costs occasioned by the collision. The owners rely on Shell's 'recommendation for Incident follow-up report' to contend that the repairs by Sarku extend beyond collision repairs to other work. They also submit that because PW4 stated that Shell required constant maintenance works to be done on its exploration and production facilities including the D-35 platform, that the cost of RM1.5m includes maintenance

costs outside of the cost of repair work. With regards to actual payment they maintain that PW4 does not commit to payment but merely states that the system generates payment.

[115] I have perused and considered the entirety of the evidence of PW4, PW5 and DW7 in relation to the issue of the cost of repair, ie the damages claimed. It appears that on the basis of the evidence, Shell:

(a) Suffered damage to the platform D-35Q-A.

(b) Instructed its then contractor, Sarku to carry out the repair works.

(c) The precise extent of the repair works to be carried out were ascertained, negotiated upon and verified prior to work commencing. As Sarku carried out all of Shell's work at the time, the quotation for the repair work, as with all other work, was on a lump sum basis. The contention that there was maintenance work carried out in addition to the repair work is largely conjectural and not borne out by any evidence. There is no evidence before this court on which a finding may be made that maintenance work was carried out in addition to the repair work. Shell in the instant case has shown how and what work was carried out by its contractor in respect of the repairs. This is borne out, inter alia, by the work order as well as the completion certificates. The testimony of PW3 and PW4 establish that a system of verification of the work done was undertaken. These documents do not disclose that Sarku undertook maintenance work in addition to the repair work. A suggestion in cross-examination to Shell's witnesses that maintenance works were included in the repair works, which in any event was denied, is insufficient to establish that maintenance works in addition to repair works was carried out. This is particularly so in view of the strict terms of the work order and procedure adopted for compliance with the same and in respect of which physical verification was undertaken.

(d) As for payment to Sarku by Shell, the evidence of PW4 that he authorised payment and that payment was generated to Sarku is sufficient to establish that Shell paid out the authorised sum to the contractor. The fact that the actual payment and a receipt were not adduced in evidence by Shell does not in itself amount to a failure to prove actual payment in view of the evidence of PW4 and the documents produced to evidence the authorisation of payment, namely the payment certificates. In the face of these documents and evidence of the system of payment adopted, Shell has established prima facie that payment was in fact, effected. The owners on the other hand have produced no evidence to rebut this evidence of payment.

(e) The owners contend that the costs of the repair undertaken by Shell was excessive. DW7 maintains that the repairs could have been undertaken at

a fraction of the costs sought by Shell. Again, Shell, by explaining the entire procedure it undertook, as well as its routine procedure for all repair works, has established that it negotiated the work order with the contractor prior to the inception of the repair works. There is complete disclosure of the precise costs of the repair work undertaken as shown in the payment schedule price breakdown. Shell has therefore established that it sought a reasonable quotation for the work undertaken. The owners produce no independent evidence to support their competing contention that the cost of the repair work was excessive save for a bare averment. As such it is not tenable to conclude on that basis alone that the repair costs were excessive.

[116] In summary it is clear that the damage to the D-35Q-A platform was undertaken by an independent contractor chosen after a stringent tender exercise, to conduct all of Shell's repair works. After the repair work order was finalised and the price negotiated on the contract on a lump sum basis, the work was in fact undertaken. Payment is evidenced by the approval of payment certificates which also bear evidence of verification, including physical verification of the work carried out. In these circumstances I am satisfied that the repair costs of RM1,425,000 and RM75,000 for a close out report were incurred by Shell. Accordingly I find that Shell is entitled to a sum of RM1.5m in damages being the total costs of repair arising from the collision, which it has proved was incurred. In view of my earlier finding on liability it follows that the owners are to pay Shell the said sum of RM1.5m in damages together with costs and interest as a consequence of the collision.

Issue (vi): In the hire action, was Sarawak Shell entitled to withhold charter-hire under the charter party agreement on the basis of a set off of its claim for damages against the owners

[117] As outlined at the outset of this judgment the in personam action or the hire action (D3(D2)–27–24 of 2005) instituted by the owners, PRM and Petrokapal against Sarawak Shell Bhd and Sabah Shell Petroleum Company Ltd for the withholding of charter-hire due to them was heard together with the collision action. In this action, Petrokapal seeks the sum of USD 186,990.26 together with interest accruing from 21 April 2002 at 8%pa until the date of full payment. The relevant facts are that vide a contract dated 7 September 2001 between Sarawak Shell Bhd jointly with Sabah Shell Petroleum Company Bhd and Petrokapal Sdn Bhd, Petrokapal, the third plaintiff in the hire action chartered the vessel 'Red Gold' to Sarawak Shell and Sabah Shell, referred to collectively as 'Shell' subject to the terms set out in the charter party agreement ('the charter party agreement'). The charter of the vessel was to commence on 15 July 2001 and continue for a duration of 7 1/2 months. In the charter party agreement, Petrokapal represented itself as the

owner of the Red Gold. The use of the vessel to deliver supplies to Shell's offshore platforms has been outlined above. Under the terms of the charter party agreement hire for the use of the vessel was to be paid by Shell to Petrokapal 45 days after issuance of invoices by Petrokapal setting out the quantum due for services rendered by the vessel.

[118] However, Petrokapal the third plaintiff in the hire action is not the owner of the vessel the Red Gold. By a separate and distinct earlier charter party agreement dated July 2001 between PRM acting for and on behalf of the owners and Petrokapal, the owners chartered the vessel to Petrokapal for use for a period of 7 1/2 months, in return for which Petrokapal undertook to pay hire to PRM on behalf of the owners at the rate of USD4,500 per day. It is material that although the two charter party contracts are 'back to back' they are separate documents which create distinct obligations for the parties under each agreement.

[119] After the collision occurred on 4 February 2002, Shell took the position that it was entitled, under the terms of the charter party agreement to withhold or set off hire due under the agreement by reason of the negligence of the owners under the charter party agreement in causing the collision. The primary issue for consideration by this court is whether or not the provisions of the charter party agreement allow for such a set off or withholding of the Hire which had accrued due.

[120] Prior to considering the express terms of the charter party agreement relating to this point, it is relevant to consider in brief the background relating to the withholding of the hire as borne out in the correspondence between Shell, Petrokapal, the owners and their solicitors.

[121] On 17 November 2003, Shell wrote to Petrokapal stating that it had completed repairs to the D-35 platform which it said amounted to approximately RM2,000,000. It sought from Petrokapal a settlement of that sum on the grounds that the collision was caused by its negligence. It will be recalled that as far as Shell was concerned, it had entered into the charter party agreement with Petrokapal where Petrokapal was designated the owner and as such all queries were directed to it. Petrokapal forwarded Shell's letter to PRM on behalf of the owners on the same day. It sought instructions from the owners as to a settlement proposal for the repair claim of RM2m, so that it could respond in turn back to Shell. The owners responded in December 2004. The owners responded to Shell's claim stating that they had a right in law to limit their liability if any to a sum well below RM2m. They sought to negotiate a settlement without prejudice. They maintained however that Shell was wrongfully detaining the hire due to them for the charter of the vessel, which they deemed improper. They sought an immediate release of the hire. They also

indicated that they would be prepared to procure an undertaking for security for Shell in the sum of RM1.5m from the Shipowners Mutual Protection & Indemnity Association. Petrokapal in turn wrote to Shell stating that in respect of Shell's claim it had been advised by the owners and its solicitors that it had a right in law to limit its liability to a sum well below RM2m. It stated that there was a prospect of negotiating a settlement on a without prejudice basis. It also maintained that the detention of hire was wrongful and sought an immediate release of the same. Finally it indicated that it was prepared to provide security for the repair costs. Subsequently Petrokapal forwarded the proposed letter of undertaking from the P & I club in respect of the repair cost claim by Shell, seeking in return the immediate release of the outstanding hire. It is evident from the foregoing that:

(a) Hire was payable by Shell to Petrokapal and not to the owners. The owners were entitled to receive payment for hire of the vessel from Petrokapal under the separate and distinct charter party agreement concluded earlier between them. The fact that there was in existence a 'back to back' arrangement does not alter the respective obligations of each party under their distinct agreements.

(b) The claim for repair costs, as far as Shell was concerned at that time, was directed to Petrokapal, with whom Shell was contracting under the charter party agreement. Petrokapal was described as the owner of the vessel under the charter party agreement. In the course of its correspondence with Shell, Petrokapal did not expressly deny liability for the repair costs and damage sustained during the collision on the basis that it was not the owner and therefore had nothing to do with the collision action. Instead Petrokapal continued to deal with Shell in respect of the repair costs and stated that it was prepared to provide or procure (albeit through the owners) a letter of undertaking from a P & I club with respect to the repair claim.

[122] Shell responded to Petrokapal on 23 December 2004 maintaining that it had a right to set off any amounts due to it for repairs. It was however prepared to consider the letter of undertaking from its P & I club. The proposed letter of undertaking was duly forwarded in January 2005 for Shell's consideration. Again, Petrokapal sought the release of the hire. Shell delayed its response for several months until May 2005, stating that it was still reviewing the matter. In March 2005, Petrokapal wrote to Shell threatening to commence action in attempt to procure payment of the hire.

[123] Thereafter in late May, the owners wrote through their solicitors stating that Shell's continued detention of their hire was wrongful. They sought a response to the proposal which had been put forward in an attempt to resolve the matter amicably. Shell's solicitors wrote to the owners' solicitors by way of

response in August 2005 stating that their contractual relationship was with Petrokapal Sdn Bhd and that as such they would respond directly to Petrokapal. In any event their position against the owners, whatever their interest might be, was as set out in their letter to Petrokapal. In Shell's letter to Petrokapal, it maintained that the liability for the collision was entirely due to the vessel and that there was no basis for limitation of liability under the Merchant Shipping Ordinance 1952. Accordingly they maintained that their withholding of hire was reasonable and proper. They indicated that Shell was prepared to consider acceptance of an appropriately worded letter of undertaking from the P & I club for a sum of RM3.15m, setting out the basis for such claim. They appended the wording for the proposed letter of undertaking they sought.

[124] It is evident from the foregoing that at all material times during the course of correspondence, Shell dealt with Petrokapal as the party primarily responsible for the collision damage, by reason of the charter party agreement. Petrokapal responded accordingly, without expressly denying liability for the collision and in fact proposing a letter of undertaking to provide security for the repair costs in return for release of the hire due to it. As such the clear distinction between the owners as the party possibly responsible for damage caused by the vessel, and Petrokapal as the contracting party under the charter party agreement was not maintained at that stage, and was in fact blurred. The lack of clear distinction between the roles and responsibilities of the parties was further blurred by the use of one set of solicitors for both the owners as well as Petrokapal thereby further effacing the distinct obligations of each party. Therefore by virtue of the correspondence, the fact situation at the time, and the charter party agreement, Shell undertook the entirety of its negotiations with Petrokapal and Petrokapal responded without denying liability for the repair costs expressly by stating that the owners were solely responsible for the same. They continued, under the charter party agreement, to negotiate as if they were the owners, offering to provide a letter of undertaking in exchange for the release of outstanding hire.

[125] Correspondence continued between the parties' solicitors in much the same vein with variations as to the quantum of security to be afforded under the letter of undertaking. There was a misunderstanding as to the quantum of security to be afforded and the express wording of the undertaking. After a series of proposals and counter-proposals Shell appeared to have agreed to accept a letter of undertaking for RM1.8m. A letter of undertaking to this extent was duly dispatched. However Shell maintains that the insertion of this sum by its solicitors was a mistake and therefore no consensus on the settlement was achieved. Shell however did not return the said letter of undertaking. An attempt was made to rectify the sum by way of application to the court but this failed at the first instance and is now before the Court of Appeal. This issue is

not directly relevant in this suit as it is evident from the entirety of the circumstances that no consensus was achieved in respect of the resolution of the outstanding hire in exchange for a letter of undertaking in an agreed sum with the express wording agreed between Shell and Petrokapal. In other words, the attempts to negotiate the provision of a letter of undertaking in return for release of the outstanding hire failed. Accordingly the action was filed.

[126] The foregoing background has been set out because one of the foremost issues raised by the owners in the hire action is that the detention of hire is wrongful because there is no claim by Shell against Petrokapal for the collision as it is the owners who would be liable for any such damage, and not Petrokapal. In other words, the relevant contracting party for the purposes of the collision action is the owners and not Petrokapal, while in the hire action the relevant party seeking payment is Petrokapal. Accordingly it is not open to Shell to withhold the hire due to Petrokapal when the collision damages are payable by the owners.

[127] This is answered by the fact that at all material times, the contracting party that dealt with Shell not only with regards to the hire, but also the collision, was Petrokapal. Moreover the contracting party under the charter party agreement was also Petrokapal. More significantly, Petrokapal at no time expressly denied liability for the damage caused but continued to hold out to Shell that it would procure a letter of undertaking from a P & I club as security for the repair costs to the D-35 platform. Given the charter party agreement, the factual background set out above, and the conduct of the parties in relation to this issue, whereby the distinction between Petrokapal and the owners was distinctly blurred until the institution of action, it follows that Shell was entitled to deal with and look to Petrokapal for the provision of security or repair costs underwritten by the owners. At all times, Shell dealt with Petrokapal in respect of all matters primarily because of the charter party agreement where it is named as the owner. This is borne out by the evidence of PW2, Thavakumar a/l Kandiahpillai, general legal counsel for Shell in Malaysia who testified, inter alia, that Shell only dealt with Petrokapal, and that the relationship between Petrokapal and the actual owners was not a matter that concerned Shell. Therefore it follows that the withholding of the hire which falls within the purview of the charter party agreement also relates directly to Petrokapal. Whether or not Shell is entitled to withhold the hire turns entirely on the charter party agreement and it is Petrokapal that is privy to that agreement, not the owners. Accordingly the fact that it is the owners who are liable for the damages in the collision action does not in itself, given the foregoing, preclude Shell from withholding or setting-off hire pending the resolution of the damages claim. That issue must turn on the construction of the relevant clauses of the charter party agreement between Shell and Petrokapal.

[128] Turning now to the primary issue for consideration in the hire action, namely the construction of cl 17 which relates to payment and the right of set off. It provides as follows:

> 17.1The owners will invoice the Charterers in United states Dollars in accordance with the terms and conditions of this Charter on or before the 15th day of each calendar month for amounts due in respect of the preceding month. All invoices shall be marked 'For the attention of EPP-FBS-Re Services for SPT-LMR) and addressed to the Charterers business/operating address first set forth in this charter.
>
> 17.2*Within 45 days of receipt of such invoice the Charterers shall pay the amount which is undisputed due to the Owners in United States Dollars into a bank account in Malaysia* as designated by the Owners and set forth in Box 14, *less any amounts disbursed on the Owners' behalf* and *less any hire paid or expenses incurred by the Charterers as may reasonably be estimated by them to relate to off-hire period*, and *less any amounts due or estimated to become due to the Charterers hereunder*, any adjustment to be made at the due date for the next or as if for a monthly payment pursuant to 17.1 after the facts have been ascertained.
>
> 17.3*If the Charterers dispute any item billed*, the Charterers shall within twenty days notify the Owners of the item under dispute specifying the Charterers' complaint. *Payment of the item under dispute shall be withheld until the settlement of the dispute*, either by mutual agreement or in accordance with the provisions of Clause 45 of this Charter. (Emphasis added.)

[129] It is trite that the clause is to be construed in the context of the entire charter party agreement to ascertain the intention of the parties. The evidence of any of the witnesses as to the meaning of the clause is not to be utilised to ascertain or glean the construction to be accorded to the clause. PW2 however did clarify that the basis for Shell's decision to withhold the charter hire stemmed from their comprehension of cl 17.2. More specifically, he referred to the words '... amount due or estimated to become due to the Charterers hereunder ...'. It remains to be considered whether those words confer a right of set off on Shell, entitling it to withhold the hire due.

[130] A reading of the entirety of the clause discloses that Petrokapal is bound to invoice Shell for services rendered on or by the 15th day of each calendar month in the manner expressly provided for in cl 17.1. Clause 17.2 provides that payment is to be made by Shell within 45 days of receipt of the invoice on amounts which are undisputed to be due. It is not in issue here that the hire is undisputed to be due.

[131] Clause 17.2 entitles Shell to deduct from the sum which is undisputed to be due, three specific categories of payments:

(a) any amounts disbursed on Petrokapal's behalf;

(b) any hire paid or expenses incurred by Shell; and

(c) any amounts due or estimated to become due to Shell hereunder, ie under the charter party agreement.

[132] There is further provision that adjustments to these sums are to be made at the due date for the next payment or as if for a monthly payment after the facts have been ascertained.

[133] Clause 17.3 in turn provides that if Shell disputes any item billed, it must notify Petrokapal of the item within 21 days specifying the basis for such dispute or complaint. After this, Shell may then withhold payment of the said sum pending resolution of the dispute. In the instant case it is not in dispute that no item billed is in issue.

[134] Reading the entirety of the clause and according it its natural and ordinary meaning it appears that cl 17.2, which Shell relies upon to justify the withholding of hire, allows for the deduction of three specific categories of payments. The last of these categories which is relevant is '... less any amounts due or estimated to become due to the Charterers hereunder ...'.

[135] Shell contends that this clause allows them to withhold the hire because the damages from the collision fall within '... amounts due or estimated to become due to the Charterers hereunder ...;'.

[136] Petrokapal on the other hand maintains that the clause does not allow for deductions for unliquidated damages payable as compensation for a breach of duty of care. Clause 17.2 it is contended, unlike cl 17.3, applies to sums readily ascertainable to be due as a debt to Shell. It is submitted that the words 'due or estimated to become due' must be read in the context ejuisdem generis to allow deductions of claims similar to off-hire and disbursements. Reference is also made to the definition of 'due' which envisages the existence of a debt which is readily ascertainable as compared to damages which envisage an assessment of compensation obtainable by success in an action.

[137] I have considered the submissions of both parties. I have borne in mind that it is the duty of the court to make an attempt to discover what a reasonable person would have understood the parties to mean. As such regard must be had not only to the individual words used, but to the agreement as a whole, the factual and legal background against which it was concluded and the objects which it was intended to achieve. Effect is to be accorded to the ordinary meaning of the words in so far as they correlate to the entire document and the factual background. Having done so, I conclude that cl 17.2 does not allow Shell to withhold the hire due pending determination or payment of

damages sought for the collision action. The issue turns on whether or not a deduction for 'monies due or estimated to become due to the Charterers hereunder' encompasses a right of set off of damages incurred by it as a consequence of the collision. It is evident that the latter sum, namely compensation or damages comprising the repair costs as a consequence of the collision cannot become monies due or estimated to become due to Shell under the charter party agreement because at the material time liability had not been ascertained. If liability had not been ascertained in a court of law, and the matter remained contentious between the parties, it follows that the compensation could not be categorised as monies due. Monies due envisage a clear debt. That is not the case here. Could it then fall within 'estimated to become due to Shell hereunder'? Again without an express and clear finding on liability it cannot also be said that the repair costs fell within an amount estimated to become due to Shell. Neither could it be said to be a sum of money due to Shell 'hereunder', ie under the charter party agreement. Given the entirety of the clause it appears to this court that there was no provision for a deduction of the repair costs from the hire. Neither is there any reference to a right of set off.

[138] Clause 17.3 which deals expressly with a right of set off provides for such an event where there is a dispute over an item billed. The repair costs for the collision clearly do not fall within the purview of an item billed under the charter party agreement and therefore this clause is also inapplicable. Accordingly I conclude that there is no provision in the charter party agreement allowing for the withholding of hire pending the payment of repair costs. Accordingly in the hire action I find that Petrokapal is entitled to the sum of USD186,990.26 together with interest from 2002.

Issue (vi): Are the owners entitled to damages for wrongful interference of the performance of the charter party agreement between the owners and Petrokapal?

[139] The basis for the addition of the owners in the hire action is the claim against Shell in tort for inducing a breach of Petrokapal's contract with the owners or for wrongful interference with such contract, causing loss. It is not entirely clear why PRM is also joined as a party as they were at all material times simply acting as agents for the owners.

[140] In para 12 of the statement of claim in the hire action, the owners state that Shell by its illegal and wrongful failure to make payment of the balance of the hire due to Petrokapal, knowingly and intentionally procured and/or

induced a breach of the contract between Petrokapal and the owners or knowingly and intentionally interfered with the performance of Petrokapal's duties and obligations owed to the owners resulting in loss and damage to the owners.

[141] The owners maintain that Shell knew that Petrokapal was not the owner of the vessel and that the registered owners were South Sumatra Richfield Marine Pte Ltd. In any event it is contended that as of 8 December 2004 Shell was aware of the owners' interest in the release of the outstanding hire and their contractual relationship with Petrokapal by reason of the owners' offer of security in exchange for the release of the hire. Coupled with these background facts is the testimony of PW2 that Shell was entitled to retain the hire as security for the repair costs of the platform. The owners maintain that despite having received a letter of undertaking for RM1.8m, Shell continued to refuse to release the hire or return the letter of undertaking. The owners maintain that Shell had no right to detain the hire when at all times Shell knew or ought to have known that it was the owners, if at all, who could possibly be liable for the repair damage. Accordingly their submission is that from the entirety of these facts it can be inferred that Shell's intention in detaining the hire was to deprive the owners of the benefit of the outstanding hire as purported security for Shell's claim or to pressure the owners into settling the D-35 repair costs. D7, Amin bin Halim Rasip, the managing director of Petrokapal in the course of his evidence sought to make this point stating, inter alia, what he believed to be Shell's knowledge as to the wrongful detention of hire and that this amounted to an interference with Petrokapal's ability to carry out its contractual duties to the owners. Petrokapal withheld the hire due to the owners by reason of Shell's detention of the outstanding hire, thereby, it is contended causing loss to the owners. It is further maintained that Shell knew and intended this consequence. Accordingly it is submitted that Shell's wrongful interference with the payment obligation of hire of Petrokapal, by the wrongful detention of the outstanding hire as a set off for the repair claim coupled with the intention to cause the owner a deprivation of monies as security for its claim or to force a settlement of the repair claim arising from the collision is wrongful.

[142] Shell submits in turn that the owners' claim for damages founded in tort for the alleged wrongful interference with the performance of Petrokapal's contract with the owners is misconceived. They point to several cases on the subject contending that the essential ingredients of the tort have not been made out in the instant case. The essential ingredients of the tort were referred to by Peter Gibson LJ in the English Court of Appeal decision of *OBG Ltd and*

another v Allan and others [2005] 2 WLR 1174 where reference was made in turn to the judgment of Rix LJ in *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and others* [2002] 2 Lloyd's Rep 436:

> ... Where as here, A procures B's breach of his contract with C, adopting it as his own because he is interested to do so, seeking a benefit for himself or a fortiori a detriment for C, and does so deliberately, knowingly and intending the breach to take place, then A puts himself in the way of incurring a liability, even though not himself a party to the contract, unless (i) he does not directly procure the breach, and (ii) he uses no (relevant) unlawful means, or (iii) he can claim some justification.

[143] It is therefore necessary to establish the tort to show that Shell deliberately and knowingly committed an overt act seeking to interfere in the performance of Petrokapal's contract with the owners, that it sought a benefit for itself or detriment for a third party. It requires an overt act committed with the intention of procuring a breach. In the instant case there are two separate and distinct contracts between Shell and Petrokapal and Petrokapal and the owners. It does not follow that simply because Shell withheld the hire that Petrokapal was justified in also withholding or refusing to pay its contractual dues under its contract with the owners. It was open at all times to Petrokapal to fulfil its contractual obligations to the owners and seek compensation from Shell for its wrongful detention of the outstanding hire.

[144] Further there is no deliberate or overt act to show that Shell deliberately sought to cause detriment to the owners. The fact that the negotiations on the letter of undertaking failed by reason of a lack of consensus on the quantum to be stipulated in the letter of undertaking and the failure of Shell to return the letter to Petrokapal and/or the owners does not, in my view amount to a deliberate act calculated to cause damage to the owners. It simply shows that negotiations to resolve the entirety of this matter in relation to collision damage and hire failed. There is insufficient evidence to satisfy the requirement that Shell deliberately procured the breach because, as stated above, it does not follow that because Shell did not pay the hire, Petrokapal was equally precluded from doing so. It was open to Petrokapal to pay its contractual dues under its contract with the owners. Therefore Petrokapal's refusal or failure to do so cannot be attributed to Shell as comprising a deliberate act to procure a breach of the contract between Petrokapal and the owners.

[145] Secondly it is not evident that Shell utilised unlawful means albeit directly or indirectly to procure an interference with Petrokapal's contract with the owners as alleged. Shell, it would appear from the correspondence and

evidence led in court through PW2, legitimately albeit mistakenly believed that they were entitled to withhold the outstanding hire under the express provisions of cl 17.2 of the charter party agreement. There is therefore also a lack of the existence or use of unlawful means to procure a breach.

[146] In the instant case while it can be said that Shell did have knowledge of the existence of Petrokapal's contract with the owners, and that their failure to pay the outstanding hire might well result in the owners being deprived of the hire as well, this does not appear to satisfy the ingredients of the tort of unlawful interference because:

(a) There were two separate and distinct contracts, one between Shell and Petrokapal; and the other between Petrokapal and the owners. Shell cannot be precluded from exercising what it believed to be its contractual rights under the contract on the basis that there is a possibility that it would affect the second and separate contract between the owners and Petrokapal.

(b) There is no evidence of an overt act committed by Shell with a view to maliciously or deliberately causing damage to the owners. While the owners maintain that the reason for Shell withholding the hire was to put pressure on them to pay for the repairs caused by the collision, the evidence discloses that Shell exercised what it believed to be its contractual right of set off under cl 17.2 of the charter party agreement. In other words, Shell had justification for withholding the outstanding hire, albeit on what is now determined to be a mistaken view by this court. This displaces the contention of a deliberate and overt act committed with a view to inducing a breach of Petrokapal's contract with the owners. In order to satisfy this ingredient there ought to be direct evidence of such an act. In the instant case there is no such direct evidence and neither can any such act be implied or inferred from the entirety of the circumstances (see *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105).

[147] For the foregoing reasons I conclude that this cause of action is not made out and dismiss this portion of the hire claim. Accordingly no damages are awarded to the owners and PRM in respect of their claim for wrongful interference with the performance of their contract.

CONCLUSION

[148] In summary the findings of this court are:

(a) The collision was caused by the negligence of the owners, its servants or agents in the management and maintenance of the Red Gold. There was

no negligence on the part of the master in the navigation of the vessel.

(b) The collision was not an inevitable accident that occurred without any negligence on the part of the owners or its servants. This court concluded that the dislodgement of the power card or defect in the functioning of the electrical component of the bow thruster unit was defect in the vessel. Such defect could in fact have been avoided by the use of reasonable maritime care, skill or management and as such the defence of inevitable accident is not made out in the circumstances of this case.

(c) There was no contributory negligence on the part of Sarawak Shell in respect of the collision.

(d) The owners did not establish that there was an absence of actual fault or privity and accordingly are not entitled to limit liability under the Merchant Shipping Ordinance 1952.

(e) Shell has established or proved the loss and damage it suffered as a consequence of the collision amounted to RM1.5m which is duly awarded to it together with interest and costs for the collision action.

(f) In the hire action, Shell was not entitled to withhold charter hire payable to Petrokapal under the charter party agreement between itself and Petrokapal on the basis of a set off of its claim for damages against the owners. Accordingly the retention of the balance of the charter hire was wrongful and the owners are entitled to payment of the same together with interest as prayed and costs.

(g) The owners have not established a cause of action in tort premised on wrongful interference with the performance of the charter party agreement between itself and Petrokapal and accordingly are not entitled to damages under this cause of action.

[149] Therefore the plaintiff in the collision action, Sarawak Shell Bhd is granted judgment against the defendant, ie the owners of the Red Gold in the sum of RM1.5m together with interest at the rate of 8%pa and costs.

[150] In the hire action, the third plaintiff, Petrokapal is granted judgment against the defendant, Sarawak Shell Bhd for the balance of the hire due to it in the sum of USD186,990.26 or the equivalent sum in Ringgit Malaysia together with interest at the rate of 8% from 2002 and costs.

[151] The first and second plaintiffs in the hire action are not entitled to damages in respect of their claim for wrongful interference of the contract between the second plaintiff on behalf of the first plaintiff and Petrokapal as this cause of action was not made out.

Plaintiff's claims allowed with costs in Admiralty in Rem No D2–27–28 of 2005 and third plaintiff's claims allowed with costs in Admiralty in Personam No D2–27–24 of 2005.

Reported by Kanesh Sundrum